CONFIRMATION OF FEDERAL JUDGES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE SELECTION AND CONFIRMATION OF FEDERAL JUDGES

MAY 26, 27; JUNE 16, 23; JULY 14, 21; AUGUST 4, 11, 18;
SEPTEMBER 15, 22, 29; DECEMBER 1, 6, AND 8, 1982

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CONFIRMATION HEARING ON:

JOHN W. POTTER, GEORGE C. PRATT, MAURICE M. PAUL, AND A. J. McNAMARA

WEDNESDAY, MAY 26, 1982

U.S. Senate,
Committee on the Judiciary,
Washington, D. C.

The committee met, pursuant to notice, at 2:40 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Staff present: Duke Short, chief investigator; Bill Christensen, and Allan Spence, investigators; and Pamela Swanner, clerk.

NOMINATION OF JOHN W. POTTER

The Chairman. The committee will come to order.

Senators Moynihan and D'Amato had to leave. I see a Congressman from Ohio in the audience. Do you have a judge you are interested in?

Mr. Latta. Yes, sir.

The Chairman. Come right around. Just have a seat.

Mr. Latta. I also have Congressman Ed Weber with me, Senator.

The Chairman. Judge Potter, is it?

Judge Potter. Yes, Your Honor.

The Chairman. Are you from Ohio?

Judge Potter. Yes, Your Honor.

The Chairman. Are you from his district, Del Latta's district?

Mr. Latta. No. He is from Ed Weber's district, but his new jurisdiction will extend over 21 counties in northwestern Ohio.

The Chairman. And your district?

Mr. Latta. That includes my district.

The Chairman. Well, we think very highly of this Congressman here, and we are glad to have him here to say a word for you. We will insert your biography into the record.

You may go ahead now, Congressman Latta.

STATEMENT OF HON. DELBERT L. LATTA, A U.S. REPRESENTATIVE FROM THE STATE OF OHIO

Mr. Latta. Well, thank you very much for those kind words, Senator. Let me say that I am proud to present to your honorable committee this afternoon, Judge Potter, who has been on the court of appeals bench in Toledo, sixth district court, since 1969. Prior to that time, he was mayor of Toledo. He is a veteran, he is a family man, and I am sure you would like to know that he is a judge who interprets the laws, rather than one who attempts to make them. He is a man I have known personally for at least 25 years. He comes highly recommended, not only from the Ohio delegation in the Congress, but also by everyone who knows him. I know of no opposition to this man's confirmation.

I would be happy to yield to my colleague, who represents this man in the Congress of the United States, Ed Weber from Toledo.

The **CHAIRMAN**. All right, we will be delighted to hear from you.

STATEMENT OF HON. ED WEBER, A U.S. REPRESENTATIVE FROM THE STATE OF OHIO

Mr. **WEBER**. Thank you very much, Senator.

It is a pleasure for me to introduce to the Senator my good friend and old friend, Judge John W. Potter. I associate myself with the remarks that Congressman Latta has just made, and wish to add that I have had the experience and the pleasure of practicing law as a colleague of the Toledo Bar with Judge Potter, when he was a practicing attorney. I have also lived in the city of which Judge Potter was one of its most distinguished mayors. Our city has been privileged to have the service of Judge Potter as a member of the Sixth District Court of Appeals for many years, from 1969 to the present time.

Judge Potter is a graduate of the University of Toledo, with honors, also a member of the Law Review at the University of Michigan Law School; he gave his country his distinguished military service, where he earned four battle stars during World War II, including the Bronze Star, a captain in the field artillery. I believe that he is exceptionally well qualified to serve as the judge of the Northern District of Ohio, the Western Division.

The **CHAIRMAN**. Thank you very much for your statement.

Is there anyone else now who wants to speak in his behalf?

[No response.]

The **CHAIRMAN**. Is your family here, Judge? Would you like to introduce any of your family?

Judge **POTTER**. Yes. I would like to introduce my wife, Senator, Phyllis Potter.

The **CHAIRMAN**. Mrs. Potter, we are glad to have you with us.

Mrs. **POTTER**. Thank you very much.

The **CHAIRMAN**. Now, you can hold up your hand and be sworn, that the evidence you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God.

Judge **POTTER**. I do.

The **CHAIRMAN**. Now, we are going to have to go and vote, and I will be back in a little bit.

Now, we took you out of order to accommodate these able Congressmen, who have endorsed you, and now, we will revert to the Circuit Court Judge Pratt.

Judge **POTTER**. Thank you very much, Senator.

NOMINATION OF GEORGE C. PRATT

The **Chairman**. Judge Pratt, if you will hold up your hand and be sworn that the evidence you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God.

Judge **Pratt**. I do.

TESTIMONY OF GEORGE C. PRATT, NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT COURT OF APPEALS

The **Chairman**. We are now going to the nomination of Judge George C. Pratt, of New York, to be U.S. Circuit Judge for the Second Circuit Court of Appeals.

Without objection, the statement by Senator D'Amato, recommending him highly, will be placed in the record at this point, and a short note from Senator Moynihan will be placed in the record as well as his biography.

[The prepared statements of Senators D'Amato and Moynihan follow:]

Prepared Statement of Senator Alfonse M. D'Amato

Mr. Chairman, distinguished members of this committee: it is with a great sense of pride that I today have the personal privilege of presenting to this committee a man whose distinguished legal career has been marked by solid accomplishment.

I speak of George C. Pratt, a fellow Long Islander, who comes from a family steeped in judicial tradition (his father, grandfather and great-grandfather all served as judges). Born in upstate Steuben County in Corning, N.Y. Judge Pratt was educated at Yale University and graduated with highest honors from its law school in 1953.

He began his career as a law clerk to court of appeals Judge Charles Froessel. He then went on to the private practice of law, for over 20 years, until President Ford selected him to be U.S. district court judge for the eastern district in 1976.

During his tenure, Judge Pratt has withstood the test of some of the most difficult cases to come before the courts of the eastern district. All who have observed him ascribe to him an extraordinary display of impartiality, fairness, and the ultimate in judicial temperament. His record is a distinguished one.

I have every confidence that he will continue in the finest tradition his exemplary service to this Nation as a U.S. circuit court judge.

I urge your favorable consideration of this eminently qualified jurist.

U.S. Senate,
Washington D.C., May 26, 1982.

Hon. Strom Thurmond,
U.S. Senate,
Washington, D.C.

Dear Mr. Chairman: Although I am necessarily absent from this hearing, I wish to convey my support for Judge George C. Pratt to be U.S. Circuit Judge for Second Circuit of New York.

Judge Pratt is a New Yorker with a distinguished career, and I am confident the Committee will tender him every proper consideration. He is recommended without reservation.

Sincerely,

Daniel Patrick Moynihan.

The **Chairman**. Now, this brings us down to questions, but I have to go and vote, Judge, and I will be back as soon as I can.

[Whereupon, at 2:47 p.m., the committee was recessed, to reconvene at 3:32 p.m. this same day.]

The **Chairman**. We have put endorsements by Senators Moynihan and D'Amato in the record, I believe.

Judge Pratt, in discussing the criticism of judicial activism in the Committee's questionnaire, you state in part, and I quote:

> "In those cases where governmental agencies persist in ignoring the constitutional rights of the citizens who they govern, severe steps are occasionally necessary to produce constitutional conduct. A classic example is overcrowded prisons, which can produce conditions that anyone would regard as violating constitutional rights. Judges have responded in various ways, occasionally by imposing too detailed requirements upon the operations of the jails. While judges cannot legislate, frequently, legislators pass statutes leaving large gaps which they either expressly or impliedly invite the courts to fill in.

Judge, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge, as opposed to an elected legislative body?

CHIEF CHARACTERISTIC OF JUDICIAL FUNCTION

Judge **Pratt**. Senator, that is not always an easy line to draw. What I had in mind in that comment is that—let me approach it this way. In terms of the criteria to distinguish the judicial function from the legislative, I would consider to be legislative matters which lay down general rules, general guides for conduct.

The chief characteristic of the judicial function is to resolve a particular dispute between individuals or, as is more frequently the case when these problems come up, an individual and some agency of the Government. Very often, the decision in the individual case must rest upon a general principle that has to be decided, and frequently, that general principle is one that could have been stated by a legislature, but is one which the legislature has not yet addressed itself to.

The fact that a case involves the establishment of a general rule cannot preclude the judge from deciding the particular case. I do not think it is proper for a judge to use a case as an occasion to reach out and try to legislate in the sense that legislatures do. On the other hand, when Congress or a State legislature passes a bill and uses a term, for example, that is not precisely defined, in effect, they have asked the courts to fill in the content, based on experience, and generally, by the evolutionary process that has characterized the common law.

I do not know if I have answered the question, but I have tried.

The **Chairman**. I realize it is difficult to draw a line.

Judge Pratt, in the reporting year of 1980, prisoner petitions comprised approximately 14 percent of all U.S. district court civil litigation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements of complete exhaustion of State remedies, time limitations on the filing of petitions and eliminating magistrates' authority to hold evidenciary hearings. Do you perceive a need to alter the degree of access to Federal courts by State prisoners, and if so, what recommendations in this area would you make?

Judge **Pratt**. The answer to the question is yes, I think there is a need; I am not sure of the best route to meet the need. Based on my own experience with petitions of that sort which I have received, as well as based on a great many cases that I have read, a large majority of the prisoner petitions that are filed are frivolous. They cannot always be determined to be frivolous under our present rules of motions to dismiss and the presumption of validity that is given to civil rights petitions.

I think that the Supreme Court is in the process of evolving various techniques for limiting access to the courts for such petitions, as well as other civil rights claims, largely by way of doctrines of exhaustion of administrative remedies, and it may well be that the recent decision by the Supreme Court will cut off access to a great many of the so-called due process claims, by requiring, in effect, that the claim be litigated in the State court rather than the Federal court, on the theory that if the State courts are functioning properly, they are providing due process for the deprivations that are alleged.

I do not know how far the Supreme Court will go with that avenue of action. It certainly would be within Congress power to make such definitions a legislative command and a modification under title 42 United States Code, section 1983, so that the result would come through not by the evolutionary process of court decisions, but by congressional fiat.

The **CHAIRMAN**. Some of these prisoners, 6 or 8 years after they have sat in prison, bring a petition claiming they did not get a fair trial, or for some other reason they want a new trial, or throw the case out. By then, maybe the witnesses are dead or moved away, and it is a very tough question to try to convict them again if they get a new trial. So we have some legislation pending now that would limit the time they would be allowed to bring a habeas corpus proceeding. Do you think that would be a good idea?

TIME LIMIT FOR GRANTING HABEAS CORPUS

Judge **PRATT**. I was going to say, what you are referring to are the habeas corpus cases which, in my experience, have not presented much of a problem. We get most of our habeas corpus cases much too soon and have to send them back for failure to exhaust the State remedies, rather than getting them many years late.

I see nothing wrong with putting a time limit on the availability of habeas corpus.

The **CHAIRMAN**. As I stated, in the reporting year of 1980, prisoner petitions comprised approximately 14 percent of all U.S. district court litigation filings.

Judge **PRATT**. Most of those are for conditions in the prisons, things that have happened to the prisoners while they have been in jail; or, they are police brutality cases, complaining of the way they were treated by the police at the time of their arrest, and really have nothing to do with their convictions themselves. They are collateral matters to the convictions.

I say that; I assert it as a fact. I would say that applies to probably 90 percent of the prisoner petitions that I get, which run on the order of 50 or 60 a year.

The **CHAIRMAN**. The Justice Department is very anxious to see a statute along this line, because they feel that it makes it very difficult if a judge throws a case out, or if a judge grants a new trial, to then have to try them again. And as I stated, sometimes the witnesses are gone or dead. It is one of these things that it seems to me that we have got to relieve the Federal courts of somewhat, and we have got to remedy this situation for the sake of allowing these criminals to get out.

Judge **Pratt**. Well, I certainly agree, it makes it extremely difficult to retry a defendant after many years. I would have some question as to how many cases in the past year this problem actually would have applied to. I have had no cases that I can recall where there was a case up for review that involved a conviction that was remote in time.

Under the Criminal Justice Act, all defendants get their lawyers, they get them paid for by the Government. They fight right to the end, right through the habeas corpus, has been my experience, but I have only been on the bench 6 years. I know it was a serious problem in years past.

The **Chairman**. Judge, you informed the committee that—and I quote:

> On some occasions, courts have gone beyond their proper functions of applying constitutional principles to specific fact situations and have become involved in administering school systems, jails, mental institutions, and other public agencies. The extent of judicial intrusion into what is normally an executive, legislative, or administrative area should be the least amount that is sufficient to guard the constitutional interest involved.

Now, what are the standards, Judge, that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders, and how would you decide when the least amount of intrusion had been reached?

OVERCROWDING CAUSES PROBLEMS

Judge **Pratt**. I think to approach that question, you would really have to approach it in a specific context. What I had in mind, I think, at the time I wrote that was a particular case that I have involving the overcrowded conditions in the Nassau County Jail, and the jail problem is one that most Federal judges have had some exposure to. In that context, the problem of determining when conditions are so bad that the court must intervene, and to some extent run the jail, it is essentially one of comparing the past precedents with respect to how much square feet per prisoner is required for minimum livable conditions, and for the necessary safety of the prisoners. What has been happening lately is the jail populations are increasing rapidly; the local authorities are reluctant to authorize the money to build new facilities. The local judges are anxious to put the offenders behind bars. In my case, the local officials came in and conceded that they were unconstitutionally overcrowded, so I did not have to make that determination of whether the line was crossed; they conceded that it was crossed, and the question then became what to do about it. The minimum intrusion, in my view, ultimately came down to pushing the burden back upon the county and telling that for every 14 people they admitted to the jail, they would have to let out 15. That got reversed by the circuit court, by the way. But that, to me, seemed to be the minimal intrusion, because it would require the county to then find the solution for what they were going to do. On the reversal, they came back, and they have worked out a consent decree. As a practical matter, Senator, what the courts find themselves faced with is both sides of the case coming in, in effect, inviting, begging the judge to step in and tell them that they have to do it, because then they can go back to their taxpayers and say, "We do not have any choice. We have to do it because a Federal judge told us to." And to a large extent, I have found my job has been saying, "No; I cannot tell you to do that, because that is not a constitutional problem. That is an administrative problem."

The CHAIRMAN. When Ronald Reagan ran for President, he said he wanted to get the Government off the backs of the people. I think it might be construed that he had in mind Federal judges trying to run school systems, dictate to hospitals and other State institutions. And the people in my State are sick and tired of it, and I think those throughout the Nation are. How do you feel about it?

Judge PRATT. Having been a school attorney and an attorney for local governments for a good bit of my professional life, and also having been a Federal judge, I am fully convinced that a Federal judge is not competent to run a school system, or a hospital, or a prison, or anything else. I think it is only in the areas where the Constitution is clear, and where the local officials have indicated an inability or an unwillingness to meet the constitutional levels, and it is only in those circumstances that the Federal courts have to step in and see that the Constitution is obeyed. I think the manner in which it is obeyed, the details of how these things are carried out, is a matter that must be left to those people who know what they are doing, in terms of administration.

The CHAIRMAN. In other words, I believe the favorite expression for that is "judicial activism." I presume you would not classify yourself as a "judicial activist"?

Judge PRATT. I have never thought of myself as a judicial activist. I get carried, kicking and screaming, into a case like that.

The CHAIRMAN. Now, finally, Judge Pratt, in your opinion, are the protections afforded by the Bill of Rights self-executing in the sense that courts may adjudicate claims arising thereunder, or must Congress act to provide enforcement mechanisms for these provisions?

Judge PRATT. Well, I think the Supreme Court has answered that question insofar as the lower Federal courts are concerned. In their decision under Bivens and the succeeding cases, they have held rather clearly that the Federal courts have jurisdiction directly under the Constitution to provide a damages remedy at least for violations under the fourth amendment, the fifth amendment, and the eighth amendment. The decision could have gone exactly the other way; it did not. I think the lower courts are bound by what the Supreme Court has held, and as things now stand, are required to accept jurisdiction in cases which do properly allege violations under the Constitution, unless there is some statutory, alternative remedy available, such as applies to the State and local governments under section 1983.

There is no such section to deal with constitutional violations by Federal officials, and Bivens has become essentially the Federal counterpart of section 1983. If you are asking me what my decision would be if it were an open question for me to decide, I really have not thought it through that far. I have taken it as given from on high, and Bivens as given, and I have to live with it.

The CHAIRMAN. Judge, I think that is all the questions I have to ask you. Do you have any statement you want to make?

Judge PRATT. No, I have nothing special to say.

The CHAIRMAN. Thank you. You may retire now.

Judge PRATT. Thank you, Senator.

The CHAIRMAN. Do you have your family here? Do you want to introduce any of your family?

Judge PRATT. No, I came alone, all alone and lonely.

The CHAIRMAN. All right. You are now excused.

NOMINATION OF MAURICE M. PAUL

The CHAIRMAN. Next, Judge Maurice M. Paul, of Florida.

There is no Senator or Congressman here to endorse any judge, is there? I do not believe so at the moment.

Have a seat. Senator Hawkins is coming, I believe.

Mr. SHORT. Come forward, Judge. If you will stand, so the Senator can swear you in.

The CHAIRMAN. If you will hold up your hand and be sworn that the evidence you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God.

Judge PAUL. I do.

TESTIMONY OF MAURICE M. PAUL, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF FLORIDA.

The CHAIRMAN. Just have a seat. Do you want to introduce your family, Judge, if you have any here?

Judge PAUL. Yes, thank you very much, Senator. I would like to introduce my wife, Eleanor, and my son, Jeff.

The CHAIRMAN. Thank you.

Without objection, your biography will be placed in the record.

Now, when Senator Hawkins arrives, we will stop and let her make such remarks about you as she desires.

Judge, I believe you have been a circuit judge of the Ninth Judicial Circuit of Florida for the past 9 years. Do you foresee any difficulty in the transition from your present position to the Federal district level?

Judge PAUL. No, sir, I do not. I believe the practical day-to-day experience of running a court will stand me in well. The difference would be, of course, the application of a different set of laws, except on diversity; I see no problems.

The CHAIRMAN. Is the circuit judge in Florida the main trial judge, like it is in South Carolina?

Judge PAUL. Yes, sir, it is the highest level trial judge.

The CHAIRMAN. Do you have the power of the death penalty and unlimited jurisdiction in civil cases?

Judge PAUL. Yes, sir, that is correct. We have minimum jurisdiction, but unlimited jurisdiction.

The CHAIRMAN. Judge Paul, there are serious problems in some prisons, particularly from the standpoint of overcrowding and effective rehabilitation. The Attorney General's Task Force on Violent Crimes recently suggested that there should be an increase in the number of jail cells available to incarcerate persons convicted of violent crimes. Would you give us your views on this suggestion, as well as any recommendations you might have regarding prison reform?

Judge **Paul**. Senator, under the present situation, as long as we are going to have criminal laws and criminals and are going to send people to jail, we have got to have a place to house them. The only problem we have in the housing of them is that the people responsible for building the facilities have not necessarily kept pace with the frequency with which maybe the circuit judges or State judges have been sending them there, but that is a legislative function. They are going to have to provide the moneys to build them if they want them built.

NEED FOR INDUSTRIES-TYPE PROGRAM

The **Chairman**. Don't you think sooner or later, the States and the Federal Government, too, are going to have to consider either building industries or factories next to these prisons, or getting private enterprise to do it, so they can make these people self-supporting, for this is tremendous manpower and womanpower that is available, and yet it is costing a huge amount to maintain these prisoners.

Judge **Paul**. They have had movements underfoot in Florida for that very—for an industries-type program, but it meets with such opposition that the legislatures, once again, are going to have to decide if that is what they are going to do. It is the public's moneys they are appropriating, and if that is the best alternative for them, they are going to have to make the step to do it. But I have no problem with the concept of having an industries-type program in a jail facility or surrounding it.

The **Chairman**. In addition to prisoners being able to become self-supporting, also, a great many of them could be trained in skills, taught trades, and this would be very helpful to them when they got out of prison and had to resume their role in society.

Judge **Paul**. Well, you have two alternatives, I guess. If you are just going to warehouse them, they are not going to be any better when they come out, so if you have a facility or a mechanism by which they can secure some training, they will be, or potentially be, better able to be a productive citizen, and certainly should be encouraged.

The **Chairman**. Judge, in response to a portion of the committee's questionnaire regarding a tendency by the judiciary to impose broader affirmative duties upon governments and society, you stated in part—and I quote:

> Courts should not legislate. It is up to the people, through their elected representatives, to make the laws, and it is the job of the courts to interpret and apply those laws. While the courts should be cautious in these areas, it should also be recognized that in fulfilling their Constitutional mandate, situations may arise where such intrusion may be required.

Judge, would you give me an example of where you feel an intrusion may be required?

Judge **Paul**. You spoke with Judge Pratt about jails, and that seems to be the prevalent one right now around the country. There does come a time when responsible State or local officials have ignored situations—and we will deal with the jails right now—where it becomes such a problem that intervention by the Federal courts is required under the office of the Federal judiciary, and once those situations arise, then I do not think that Judges should deny relief because of intrusion where the legislature maybe should have worked. But once in, I think they ought to get in and get out as quickly as possible, rather than to stay in and try to operate the systems.

The **Chairman**. Judge, also in response to the committee questionnaire, you stated:

> The courts have in fact come under deserved criticism for the seeming intervention into the day-to-day running or oversight of various institutions and facilities. Great restraint should be exercised by the court before undertaking such a supervisory role and, when undertaken should attempt to withdraw from such supervision as soon as practicable, and return the operation to the duly elected or appointed representatives.

Judge, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge **Paul**. Senator, it appeared to me that what you would do first would be to—once again, using the jails as an example—if you found a situation, you should set the guidelines by which the State or local people would know the parameters that they could operate. It would be only when they refused to follow whatever these guidelines might be that you would be justified, I believe, in coming in and then maybe having to undertake an operation. But the courts should not be running prisons or any other things, on a day-to-day basis.

The **Chairman**. Judge Paul, it is widely known that the State of Florida faces major problems involving the distribution of illegal drugs. As I have previously stated, Senator Hawkins, the very able Senator from Florida, is to be congratulated for her concern and foresight in creating a Senate Drug Enforcement Caucus, which is designed to serve as an informal, bipartisan forum which will share information and jointly seek solutions to the national problem of drug abuse. The formation of this group is a start in the right direction. However, I feel that swift and just punishment for repeat offenders is a necessity.

Judge, would you give us your views of penalties that should be imposed on second and third-time drug violators?

VIEWS ON PENALTIES FOR DRUG VIOLATORS

Judge **Paul**. Well, they ought to be progressive. I think you have to differentiate, though, whether or not we are talking about the user as opposed to the people who do the selling. I made such differentiation when I was on the criminal bench, and the pushers, the sellers, the higher ups are the ones you have got to target and have got to send to jail and have got to make it progressive. And it seems that we have available to us—or, the Federal Government and both governments have available to them—perhaps better ways, through utilization of the "RICO" statutes and so forth, to get to the money, as opposed to get to the individual. But as a concept, I think convicted repeated offenders of the pusher type certainly deserve increasingly more time.

The **Chairman**. I believe Florida has a law that encourages people to reveal the sellers and distributors of drugs and they can get the sentence reduced by so doing; is that correct?

Judge **Paul**. Yes, sir, it is correct.

The **Chairman**. How has that law worked out?

Judge **Paul**. It is new, but it seems to be working. What it is, in essence, is that people who are convicted of drug trafficking are required to face certain mandatory sentences, depending upon the level of drugs they are involved in, and once convicted of that, in the sentencing process, the court, on recommendation of the prosecuting attorney, can mitigate those sentences if the individual sort of cooperates and provides some evidence to get other drug dealers, or people higher up in the chain.

I think it is working well for as short a period of time we have had it, but I think it is a useful tool for the prosecutors and all interested citizens.

The **Chairman**. Judge, I think those are all the questions I have. Do you have any statement you want to make?

Judge **Paul**. Senator, none, other than just to thank you for the opportunity to appear before you, sir.

The **Chairman**. You do not consider yourself a "judicial activist", do you?

Judge **Paul**. I never have, sir, and I do not today.

The **Chairman**. We have had too much judicial activism.

Judge **Paul**. I think I have stated it in my position, that we have certain roles to function in, and when we all do our job well, the Government and society work well; let everyone do their job.

The **Chairman**. We want the Congress, they do it as an executive branch, and let judicial stay within their state of jurisdiction; do you agree to that?

Judge **Paul**. Absolutely.

The **Chairman**. I think that is all. Thank you very much, Judge, and you are now dismissed.

Judge **Paul**. Thank you again, sir.

The **Chairman**. Without objection, a statement by Senator Chiles will be placed in the record, concerning Judge Paul.

[The prepared statements of Senators Hawkins and Chiles follow:]

Prepared Statement of Senator Paula Hawkins

Mr. Chairman and members of the committee: It is a great honor and privilege for me to present to you Maurice Mitchell Paul who has been nominated by President Reagan to fill the position of federal judge for the Northern District of Florida. I had the opportunity to recommend Judge Paul to our President last fall, and today, I strongly reaffirm my support for his appointment.

I would like to briefly share with you some of this gentleman's background and the reason he has been selected for this important post in our federal judiciary. Maurice Paul has the experience, ability, and character necessary to become a great federal jurist. His life has been an example of achievement and success in every endeavor. At the University of Florida, he distinguished himself in the academic field by graduating with honors from the College of Law in 1960. Prior to his graduation from the University of Florida, he served his State and Nation well in our military forces, both as a member of the Florida Air National Guard and as a pilot in the United States Air Force.

After graduation, he began his legal career in private practice in central Florida. Maurice Paul soon gained a reputation as an able and respected practictioner before the bar. In October of 1972, that reputation spoke for itself when Maurice Paul was elected to the position of Circuit Judge to the Ninth Judicial Circuit of Florida. In 1978 he was elected to another six year term without opposition.

As a circuit judge, Maurice Paul served as a member of the Education Committee of the Conference of Circuit Judges and has served as Vice Chairman of that body since 1979. He has also served as a member of the New Judges' College sponsored by the Florida Supreme Court and was later appointed Dean of the Florida Judicial College.

In February of 1980, he was appointed by the Florida Supreme Court to the Florida Court Educational Council.

In addition to a distinguished career in the State Circuit Court, Judge Paul has worked to make his community a better place in which to live. He has been active as a member of the Orange County Parental Home Commission, the Criminal Justice Planning Council, the High Crime Impact Committee, Criminal Justice Services to Women Task Force, "Thee Door" Task Program Advisory Council, Orlando Crime Study Commission and the Task Advisory Council for the Florida Council on Criminal Justice. He is also a member of the Episcopal Church of the Good Shepherd in Maitland, Florida.

I am pleased also to present to you a man who respects the family unit, both as an institution and in the practice of his daily life. He has been married 27 years to Eleanor James Paul. They have one son, James Jeffery Paul, who is a student at Duke University.

There are many honors which I could recite relating to this gentleman, but there is no greater honor than that which has been bestowed upon this jurist by his peers. Recently, a poll was conducted of attorneys throughout central Florida, and I would like to conclude by sharing with you comments from that poll:

"When asked to list the best three judges in the circuit, the attorneys overwhelmingly selected Paul at the top. He is a former Orlando attorney elected to the bench in 1972. The best one in every respect, one lawyer wrote of Paul in a space on the questionnaire reserved for comments, "Too bad more of his caliber do not aspire to the judiciary." "Orange County's best trial judge," another attorney wrote. "Tremendous knowledge of the law, able to handle the most difficult of cases." With those words, Mr. Chairman and members of the committee, I once again recommend to you for your consideration for appointment to the Federal Judgeship for the Northern District of Florida, Maurice Paul.

Prepared Statement of Senator Lawton Chiles

Mr. Chairman, I'd like to say a couple of words on behalf of Maurice Paul, who has been nominated to serve on the United States District Court for the Northern District of Florida. Judge Paul has a distinguished record of service on both sides of the bench in my home State, as a judge and as an attorney. I want to take a moment to relate some of his achievements to you.

Judge Paul has been a member of the Florida Bar since 1960, when he graduated from my alma mater, the University of Florida Law School. Since that time, he has distinguished himself in the legal profession. During nine years of service in Florida's 9th Judicial Circuit, Judge Paul has established an excellent reputation in many areas of jurisprudence. Prior to his service on the bench, he spent a year teaching law at the University of Florida and 12 years in private practice. During the 1950's, he served his country for 3 years as an officer in the Air Force.

With this background, Judge Paul has developed a keen understanding of State and Federal law, and a feel for Florida's particular needs. I know him to be a highly capable jurist who has the well-deserved respect of the Florida legal profession. I hope this Committee and the full Senate will move toward a speedy confirmation of Judge Paul.

TESTIMONY OF JOHN W. POTTER, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

The Chairman. Judge John W. Potter, of Ohio.

Judge, I believe I have already sworn you, haven't I?

Judge Potter. That is right, Your Honor.

The Chairman. And I believe you have introduced your wife.

Have a seat, Judge. I am glad to see you again, and we are glad to have you here.

Judge POTTER. Thank you.

The CHAIRMAN. Judge Potter, you have served on the Sixth District Court of Appeals for the State of Ohio since 1969. This, I believe, is an intermediate Court of Appeals which hears appeals from final orders, except on motions to suppress, in civil and criminal cases from inferior trial courts of the eight northwestern Ohio counties. You will also hear appeals from administrative agencies, as provided by law.

Judge, do you foresee any difficulty in the transition from your present position in the Appellate Court to that of a trial Judge at the Federal District level?

Judge POTTER. Well, I am sure that there is a great deal that I am going to have to learn, and I look at it as a great challenge. I think in part, having served on an intermediate appellate court, having read the records and read the charges, and looked over the various trials, I think in part, it will aid me to be a good trial judge, because I think I have seen some of the pitfalls and some of the problems of trial practice, and I believe that I can avoid those as I serve as a trial judge.

The CHAIRMAN. Judge, would you tell the committee how you would handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to act or represent the interest of his or her client?

Judge POTTER. I think, Your Honor, as a judge, and in your own practice, you have seen attorneys come in who have tried to enlist the aid of the court to try their case. And of course, that gives them the best of two worlds if the judge also becomes the advocate. But I think the function of a judge is to see that justice prevails, and I think a continuance in the session of the court and a conference with the attorney, suggesting perhaps he get cocounsel who might assist him, might be necessary, so that ultimately, justice would prevail in that transaction.

The CHAIRMAN. Judge, in response to a question on the committee's questionnaire, you stated:

> Having served as a mayor, with some limited administrative duties, in a legislative body, and as a State judge, I am aware of the constitutional sphere of authority of each branch. I appreciate that in rare instances, to preserve constitutional rights, a court may have to intervene. Because of my experience and philosophy, I would consider court intervention as a matter of last resort.

Now, Judge, if you felt that you must intervene to preserve constitutional rights, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions could be detected either through the text of a provision or its surrounding legislative history?

Judge POTTER. Well, I have always tried to interpret the legislation, rather than try to formulate new laws under my own concept. I think that the rights of the litigants would have to be crying out in some of those suspect categories of race or sex or religion, and those categories which are preserved under the bill of rights.

The **CHAIRMAN.** I may have a few more questions I want to ask for the record. I have got to leave here in about 5 minutes, and I would like to get through your testimony.

You believe it would be helpful to you as a U.S. district court judge to have a sentencing commission to establish uniformity in sentencing. That is one thing we are working on now.

Judge **POTTER.** Yes. I think that is going to be very helpful, and I have seen the disparity in the sentencing. I think a judge has to have some degree of discretion, depending on who is appearing before him, a hardened criminal or a juvenile. But I think we do need the criminal to know that this is going to happen if he violates the law.

The **CHAIRMAN.** You do not consider yourself a "judicial activist," do you?

Judge **POTTER.** No, Your Honor, and as I said, having served as a mayor and as a State judge, I think by training and history, I am not in that category.

The **CHAIRMAN.** That is fine. I wish you well on the bench. We are glad to have you with us, and you are now excused.

Judge **POTTER.** Thank you. It was an honor to be here.

NOMINATION OF A. J. (BUDDY) MCNAMARA

The **CHAIRMAN.** Now, Mr. McNamara, if we can get through with you real quick here, because there is a vote on now, and I have got to go in about 5 minutes.

Would you stand and be sworn, please, that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God.

Mr. **McNAMARA.** I do.

TESTIMONY OF A. J. (BUDDY) McNAMARA, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF LOUISIANA

The **CHAIRMAN.** Mr. McNamara, I believe you are from Louisiana?

Mr. **McNAMARA.** Yes.

The **CHAIRMAN.** Without objection, we will place your biography in the record.

I have a few questions here that I would like to propound to you, and please make your answers as brief as you can.

Mr. McNamara, would you please describe the arrangements that you have made to dissolve your financial interest in your law firm; what time period is involved, and what arrangements have you made to be compensated for your work on pending litigation?

Mr. **McNAMARA.** Yes, sir, the amount has been fixed, and it is going to be paid at a fixed monthly rate, and it will go about 3 years and 3 months. I might add that my law firm can never practice before my court, because my brother is also a member of the law firm.

The **CHAIRMAN.** Mr. McNamara, it seems that many drug dealers, when arrested, are able to pay bond money easily, and in some cases, leave the country to resume their activities elsewhere. What changes, if any, in bail reform do you feel should be implemented in order to deter this type of activity?

Mr. McNamara. One of the things we could do, Senator, is make one provision in setting bail the likelihood of the defendant to be a danger to the community. I might add that we just did that in Louisiana last year, and I think that it is going to be helpful.

The Chairman. I might say that is part of this package we did introduce today, too, at the Federal level.

Mr. McNamara. Yes, sir. I think that the drug business is just that, a big business, but if you make the overhead high enough, and certainly when it gets to be greater than the gross income, the business is going to die.

The Chairman. In the case of drugs, sometimes the amount of bail does not make much difference. If bail is $1 million, they may put it up and then forfeit it just to get away, because they make so much money. Have you given much thought to that?

Mr. McNamara. Yes, sir, but I think when we look at the statute I just proposed that we passed in Louisiana last year to make dangerous as to the community as an element of whether you are going to set bail at all, I think that you can help solve that problem.

The Chairman. Mr. McNamara, can you please tell the committee how you will resolve any potential conflicts of interest, including the procedure you will follow in determining these areas of concern?

Mr. McNamara. Senator, I think that conflicts of interest would become apparent at some stage of the litigation, probably when it first comes to the attention of your section of court. At that time, you would explain the conflict, the reason for it, and recuse yourself.

The Chairman. Mr. McNamara, the phrase, "judicial activism," is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase, "judicial activism," mean to you?

Mr. McNamara. "Judicial activism," to me, means when a judge leaves his duty of interpreting the law and begins policy making.

The Chairman. Mr. McNamara, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal Judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. McNamara. The duty of the judge is to follow the Constitution, because that is the oath that he takes.

The Chairman. Mr. McNamara, we are glad to have you with us. We wish you well on the bench, and good luck to you.

Mr. McNamara. Thank you, Senator.

The Chairman. Do you have any of your family here?

Mr. McNamara. No, sir, I do not.

The Chairman. I have a statement here from Senator Johnston, endorsing you, and without objection, that will be placed in the record.

[The prepared statement of Senator Johnston follows:]

Prepared Statement of Senator J. Bennett Johnston

I am pleased to present to the Chairman, members of the Committee, and my fellow Senators a distinguished lawyer, legislator and citizen of Louisiana, A. J.

"Buddy" McNamara, who has been nominated by the President to be United States District Judge for the Eastern District Of Lousiana.

Buddy McNamara was born in New Orleans in 1936. He is a graduate of LSU and the Loyola University School of Law top 10 percent of class. Since 1968, he has practiced in the Federal courts, principally in Louisiana but also in Texas and Florida.

He has had a wide and varied trial practice, representing both plaintiffs and defendants in civil and criminal proceedings, with particular emphasis on general maritime law, including the Jones Act, the Longshoremen and Harborworkers' Act and the Outer Continental Shelf Lands Act. He also has experience in products liability actions.

Mr. McNamara has not limited his legal practice to civil actions. He has represented numerous defendants in Federal court, either as retained or as court-appointed counsel, arguing cases involving, among other crimes, attempted aircraft hijacking, bank robbery, narcotics sales and gambling conspiracy.

That he has earned the professional respect of his fellow attorneys is evident from his election to a 3-man trial committee to try, on behalf of all plantiffs, the personal injury and death cases resulting from the collision and sinking of the Coast Guard cutter, White Alder. The judges of the U.S. District Court for the Eastern District of Louisiana themselves selected him as one of three lawyers to participate in a Fifth District Court Seminar on rules of discovery in federal criminal cases.

His term in the Lousiana House of Representatives and as assistant to Governor Treen during the 1981 Legislative Session have familiarized him both with the problem of society and with the political and legislative solutions to those problems

I am honored to present Mr. McNamara to this Committee for its consideration. He is a fine lawyer, as well as a devoted family man. He served his country, both in the reserves and on active duty as a naval officer, and spent 4 years in public service in the Louisiana Legislature. I believe that his breadth of trial experience as well as his outstanding personal qualifications equip him in every way for a seat on this distinguished court.

The CHAIRMAN. I believe that completes the hearing, so we now stand adjourned.

[Whereupon, at 4:15 p.m., the committee was adjourned.].

BIOGRAPHIES

JOHN W. POTTER

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Birth: October 25, 1918, Toledo, Ohio.

Legal residence: Ohio.

Marital status: Married to Phyllis May Bihn Potter, 3 children.

Education: 1936–40, University of Toledo, Ph. B. with honors; 1940–42, 1946—University of Michigan Law School, J.D. degree.

Bar: 1947—Ohio.

Military service: 1942–46 (Reserve 46–51)—U.S. Army.

Experience: 1946–69—Boxell, Bebout, Torbet & Potter, Toledo, Ohio (firm has had various other names); 1961–67—Mayor, City of Toledo; 1968–69—Assistant attorney general, State of Ohio; 1969 to present—Judge, Court of Appeals Sixth Appellate District of Ohio.

GEORGE C. PRATT

NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT COURT OF APPEALS

Birth: May 22, 1928, Corning, N.Y.

Legal residence: New York.

Marital status: Married to Carol June Hoffman, 4 children.

Education: 1946–50—Yale University, B.A. degree; 1950–53—J.D. degree, cum laude.

Bar: 1953—New York.

Experience: 1953–55—law clerk for Charles Froessel, associate judge of New York State Court of Appeals; 1955–60—Sprague & Stern, Mineola, New York; 1960–65—Andromidas & Pratt; 1965–67—Andromidas, McKnight, Pratt, Caemmerer & Pitcher; 1967-76—Farrell, Fritz, Pratt, Caemmerer & Cleary, P.C. May, 76 to present—U.S. district judge, Eastern District of New York.

MAURICE M. PAUL

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF FLORIDA

Birth: May 16, 1932, Jacksonville, Fla.

Legal residence: Florida.

Marital status: Married to Eleanor James Paul, one son.

Education: 1950-54—University of Florida, BSBA degree; 1957-60—University of Florida College of Law, LL.B. degree.

Bar: 1960—Florida.

Military service: 1954-57—U.S. Air Force, 1st Lieutenant.

Experience: 1960—Interim instructor, University of Florida, College of Law; 1960-64—associate, Sanders, McEwan, Mims & MacDonald, Orlando, Fla.; 1965-66—partner, Akerman, Senterfitt, Eidson, Mesmer & Robinson, Orlando; 1967—Private practice, Orlando; 1968-69—partner, Pitts, Eubanks, Ross & Paul, Orlando; 1960-72—Private practice, Orlando; 1973 to present—Circuit judge, Ninth Judicial Circuit of Florida.

A. J. MCNAMARA

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF LOUISIANA

Birth: June 9, 1936, New Orleans, La.

Legal residence: Louisiana.

Marital status: Married to Alma Louise Loisel, 4 children.

Education: 1954-59—Louisiana State University, B.S. degree; 1965-68—Loyola University School of Law, J.D. degree.

Bar: 1968—Louisiana.

Military service: 1959-62—U.S. Navy.

Experience: 1966-68—Bailiff-law clerk, Hon. Herbert W. Christenberry, U.S. District Court, Eastern District of Louisiana; 1968-72—Private practice, New Orleans, La.; 1972-78—Monton, Roy, Carmouche, Hailey, Bivins & McNamara, New Orleans, La.; 1976-80—Representative, Louisiana House of Representatives; 1978 to present—Hailey, McNamara, McNamara & Hall, New Orleans; La.; April 1981-July 1981 and November 1981—Special counsel on legislative matters to Governor Treen.

CONFIRMATION HEARING ON HAROLD M. FONG

THURSDAY, MAY 27, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:35 p.m., in room 1318, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Biden.

Staff present: Duke Short, chief investigator; Bill Christensen, and Allan Spence, investigators; Pamela Swanner, clerk; and Michael Gelacak, minority staff director.

NOMINATION OF HAROLD M. FONG

The CHAIRMAN. The committee will come to order.

Today we have met for the purpose of considering the nomination of Mr. Harold M. Fong to be U. S. district judge for the District of Hawaii.

Just before going into this, I happened to see a U. S. district judge from my State visiting here, Judge William Wilkins, Jr., was confirmed last year as a judge. We are glad to have you here, Judge Wilkins, along with your charming wife.

Mr. Fong, if you will stand up and be sworn first.

Do you solemnly swear the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FONG. I do.

The CHAIRMAN. We are delighted to have the able and distinguished senior Senator from Hawaii here, Senator Inouye, to present you. Senator, we will be delighted to hear from you now.

STATEMENT OF HON. DANIEL K. INOUYE, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator INOUYE. Thank you very much, Mr. Chairman. Mr. Chairman and members of the committee, it is my great pleasure to present to the committee the President's nominee for the vacancy in the District Court of the District of Hawaii. The man selected by the President of the United States is Mr. Harold M. Fong. Mr. Fong is a distinguished citizen of the State of Hawaii. He was born in Honolulu in April of 1938. He received his baccalaureate at the University of Southern California in 1960. He received his law degree at the University of Michigan in Ann Arbor in 1964.

From October 1, 1969 to May 31, 1973, Mr. Fong served as the assistant U. S. attorney in the District of Hawaii. From June 1, 1973, to June 14, 1978, he served as U. S. attorney. During the other periods of his varied practice, he served with a most prestigious law firm in Honolulu, one which was founded by a man very familiar and dear to us, the first Senator from the State of Hawaii, Senator Hiram L. Fong.

Mr. Chairman, as you may have noted, I did express some reservation about this nomination. My reservation, as the record would show, has never been based upon the nominee's qualifications, his character or his integrity. My reservations were based upon the mode and the method of appointment.

As you may be aware, Mr. Chairman, in 1979 my colleague, Senator Matsunaga, and I, together with the Hawaii Bar Association created the Hawaii Federal Selection Commission on the appointment of Federal judges and U. S. attorneys. It was in operation at that time but apparently this method was not used. However, I am well aware that the President under the Constitution has the final responsibility, in fact the sole responsibility of nominating judges. On that basis, since the will has been expressed, the examinations have been made, and I have been advised that your investigators have found that everything is in order. I am pleased to support the appointment and the confirmation by this body of Harold M. Fong, Esq.; to serve as judge of the Hawaii district.

The **Chairman**. Thank you very much.

I see we have the able junior Senator from Hawaii here, too. Senator, we will be delighted to have you speak in this gentleman's behalf if you care to.

STATEMENT OF HON. SPARK M. MATSUNAGA, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator **Matsunaga**. Thank you, Mr. Chairman. I subscribe to what my senior Senator has said. I join in support of Mr. Harold M. Fong to be the judge of the U.S. District Court, Hawaii.

The **Chairman**. Thank you very much.

I believe the record shows that both of you gentlemen, Senator Inouye and Senator Matsunaga, have submitted your blue slips approving this nomination.

I know how busy you Senators are. If you have any other business or occasion that will take you away from the hearing, we will understand it, and you are now excused.

Senator **Inouye**. Thank you, Mr. Chairman.

Senator **Matsunaga**. Thank you, Mr. Chairman.

The **Chairman**. Mr. Fong, I have a résumé here of your education and experience. Without objection, that will be placed in the record.

Before you begin, would you like to present any members of your family who are here?

Mr. **Fong**. Yes, Mr. Chairman. I am pleased to have with me my wife, Mrs. Judith Fong, who flew in from Hawaii just this weekend to be here.

The **Chairman**. Would you care to stand up? We are glad to have you with us.

Do you have any children here?

Mr. FONG. They are still in school, unfortunately. I am sure they would love to have been here.

The CHAIRMAN. Are there any other members of your family here or friends you want to present?

Mr. FONG. There are no other members.

The CHAIRMAN. We will proceed then with questions.

TESTIMONY OF HAROLD M. FONG, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF HAWAII

The CHAIRMAN. Mr. Fong, I see that you have served as assistant U.S. attorney for the District of Hawaii from 1969 through 1973 and as U.S. attorney for Hawaii from 1973 to 1978. I am sure that in those positions you have prosecuted all types of crimes. Today in the United States we are faced with a major problem of controlling violent crime. In fact, in a recent hearing before this committee, the Attorney General stated that the problem of violent crime was very high on the list of priorities for the Department of Justice. Mr. Fong, what do you see as the role of the Federal judiciary in dealing with the problem of violent crime?

Mr. FONG. Mr. Chairman, let me say that, when I was first selected to be the U.S. attorney for the District of Hawaii, it was understood at the time that the person selected should be one who would take a very hard position on those who would commit violent crime. In my career I have personally handled myself, the actual trial of organized crime figures in Hawaii. I was quite successful with prosecution. At the time of sentencing, I took the very hard line that they should be sentenced the maximum imprisonment, especially those persons who are known as man-endangering types of people. I still hold to these same views today. I think that the Federal judges should be very mindful of their responsibility. Not only do we have the duty to protect the right of an individual, but we have to be aware of those persons who are victims of crime. In meting out sentences, I think that, if there was a spectrum to be considered, I would stand to the side of being pretty hard on those who would commit violent crimes.

The CHAIRMAN. Mr. Fong, there has been some criticism that while you were the U.S. attorney certain cases arising out of the Kukui Plaza investigation were improperly handled. Would you please tell the committee the facts surrounding this investigation and specifically the details relating to income tax charges being brought against Mr. Hal Hansen in October of 1977.

Mr. FONG. Yes, Mr. Chairman, I would be very glad to say on the record, as I have always said before. This investigation started back in 1976. At that time the city council of Honolulu started an investigation on a housing project called Kukui Plaza. It was implied at that investigation, the city council investigation, that the mayor of Honolulu, Frank F. Fasi, was implicated somehow. Now, this is long before my office became involved. At that time, the IRS had shadowed this investigation, and they had spoken with certain witnesses. Sometime in the summer of 1976, certain witnesses—and I refer specifically to a witness named Mr. Joseph Zbin—flew over to San Francisco with their attorney and presented themselves to the strike force office, offering to turn State's witness against the developer in that case, Mr. Hal Hansen. The strike force considered the evidence of the case and decided that it was best handled by the U.S. attorney.

It was then decided that I would be the one handling the case. The case was then referred back to Honolulu, Hawaii, where I then convened a grand jury in order to take certain testimonies. Now, recall, this was the summer of 1976. We then put on the main witnesses: Mr. Zbin, Mr. Norman Buehl, and others. These witnesses testified before the grand jury and were granted immunity. Mr. Zbin was given immunity by the Department of Justice specifically for the reason that Mr. Halfton "Hal" Hansen was the chief target involved in that investigation.

At about the same time, obviously, there were indications that perhaps Mr. Frank Fasi, Mayor Fasi, was implicated in Kukui Plaza. I allowed—and by the way I have to say there were two kinds of charges that the strike force talked to me about. One was an obvious IRS case. Another was a wire fraud or mail fraud case. I permitted the grand jury to engage in an extensive investigation of these charges in the hopes that, if anything came up in the course of this investigation that implicated Mr. Fasi, then we would have as much of a case against Mr. Fasi as the State was claiming to have.

The investigation proceeded through the fall of 1976. We were convinced sometime in the early winter of 1976-77 that the only person that we had a charge against was Mr. Hal Hansen. Mr. Hansen's case was written up by IRS intelligence division, referred to regional counsel, referred to Washington to the Justice Department, where authorization was given to my office and for me to proceed with an indictment against Mr. Hansen.

Somehow at about the same time the State of Hawaii, using Mr. Hansen as its key witness, managed to contact the Justice Department, so I am told, and was able to withdraw my authorization to proceed with indictment of Mr. Hansen. This was sometime in February or March of 1977.

Mind you, I had at this time continuing authorization as the power of the U. S. Attorney to proceed with the postal violations, with mail fraud and with wire fraud cases. But I held up on these indictments only for the reason of permitting the Internal Revenue special agents to conduct its investigation and to make its case against Mr. Hansen.

Mr. SHORT. Was that at the request of the IRS?

Mr. FONG. That was at the request of the IRS, yes, sir.

As the spring went into summer, it became apparent that for some reason totally unbeknownst to me the prosecution authorization was being withheld in the Justice Department in the Tax Division. The Internal Revenue agents, both of them, Mr. Mijo and Mr. Hironaka, flew up to Washington to find out just what exactly was holding this up. Well, they came back with the conclusion that there must have been some contact made between the attorney general of the State of Hawaii, Mr. Amemiya, and his special prosecutor, Mr. Grant Cooper, and some agreement with the Tax Division that, for whatever reason they had in mind, they would withhold authorization from me. At the request of IRS, they then asked me, by the way, to go ahead with the wire fraud case because that would be the vehicle to proceed with prosecution——

Mr. SHORT. Excuse me. When you say they, are you referring to the IRS again?

Mr. FONG. The IRS, yes.

To proceed with prosecution so that we would have a charge against Mr. Hansen. The Tax Division would therefore have no further reason to hold back its prosecutive authority. Now, at about the same time the Chief of the Criminal Division, the Criminal Section of the Tax Division had changed. Stanley Crisa became the Chief.

I was in contact with Mr. Crisa. He advised me that under his handling of the section he was not going to play politics. He was not going to hold up any prosecution. He was going to move forward. But it had to take its time. It had to take its time because it had to be reviewed by five people and ultimately by Mr. M. Carr Fergusson, the Assistant Attorney General of the United States in charge of the Tax Division. With the assurance that the authorization would eventually come, I went ahead with the postal violation.

The tax case ultimately was authorized, I believe, in September or so because I remember bringing the indictment in October, I believe. Now, I have to say that—you recall what I earlier had testified to, that I started this investigation in the summer or early fall of 1976. Because this was not brought before a special grand jury, we had the life of the grand jury running out 1 year later. It was necessary for me to bring the indictment first of the postal case within the life of that jury. I had to ask for an extension of additional time within which to bring the IRS charges.

The danger we were facing was that we had brought in all of these witnesses, we had subpenaed thousands of documents, all before the then existing grand jury. It was necessary from our part to come out with the indictment within the life of that sitting grand jury. That is how ultimately it came about and why it happened during the time that it did.

Mr. SHORT. Was the extension granted? If so, who granted the extension?

Mr. FONG. Judge King was the chief judge. We went to Judge King and said that we had already taken all of this testimony and if he could give us an additional extension of time, and he gave it for, I believe it was 3 months. When I finally returned the indictment on the tax charge, it was barely within the life of the extended period.

Mr. SHORT. Does that finish your statement?

Mr. FONG. That finishes my statement.

Mr. SHORT. Would you explain the *Mung Yee* case and its transfer from Hawaii to the Central District of California in 1975? There was some concern about the case being transferred to obtain a more lenient sentence for the defendant.

Mr. FONG. The *Mung Yee* case was really called the *United Hawaiian Realty* case. This was a case that came to our attention, referred to us by a Federal agency that had investigated a real estate condominium. It was decided that we would make an example, by prosecution, of course, of those persons who would lie and falsify records because they were in fact straw buyers. Mung Yee was the principal developer of that condominium project. Mr. William C. McCorriston, my assistant, was handling that case. Mr. McCorriston had direction from me to proceed with prosecution, take this matter to the grand jury, and indict all those persons who were called and who lied to the grand jury that they in fact intended to stay and live in that condominium.

We had enough testimony already from the other buyers, straw buyers who admitted that this was a big sham. They were really truly straw buyers.

Now, Mung Yee was indicted, among others. Mung Yee was a resident of Hawaii. But at about the time when his case came up for arraignment, he was under treatment by two doctors, as I recall, in Los Angeles. He was in fact living in Los Angeles. Mung Yee had had at least three different counsel at various times. They asked me whether or not I would object if this case was ultimately handled in Los Angeles. I had no objection because, as you know, the work of the Federal prosecutor is concluded when he secures a guilty verdict or a guilty plea. Whenever there is a transfer pursuant to rule 20 of the Federal Rules of Criminal Procedure, the only kind of a plea that you can have in the arresting jurisdiction is a guilty plea. So, I felt that——

Mr. SHORT. Can you not have a nolo plea as well?

Mr. FONG. You can have a nolo plea if the judge would accept that. You could have a guilty or a nolo, but it results in the same. It results in a finding and an adjudication of guilt by the Federal judge.

Armed with several letters from treating physicians, a motion was made before Judge Martin Pence in Honolulu. Judge Pence—and I recall I was in court. Defense counsel was in court, two defense counsel, as a matter of fact: Mr. Miho and Mr. Howard Hoddick. We advised Judge Pence exactly what was going to happen, that this matter was going to go to Los Angeles and that this matter would go to Los Angeles ultimately with either a guilty plea, if the judge did not otherwise allow a nolo contendere plea, and they were fully advised. We knew that they were going to ask for a nolo contendere. But, of course, if the Federal judge did not go along with it, they would be entering a guilty plea because if they did not, that case would automatically come back to Hawaii.

With that in mind, Judge Pence on, I believe, March 20, 1975, agreed that that could be done. My only role was to say that the Government had no objection.

Obviously, when a case goes to Los Angeles or any other jurisdiction other than Hawaii, I as a U.S. attorney, could not bind any Federal judge on sentencing. I would have no premises to make recommendations or otherwise. It was between the defense counsel and the U. S. attorney in the Central District of California, which is Los Angeles. That case went to Los Angeles and somehow I believe two or three attempts were made to sentence Mr. Mung Yee. We found out that for some unknown reason Judge Pence had contacted Judge Firth in Los Angeles, complained about how the case got there, which was a surprise to us because he was very much part of the procedures that sent the case to Los Angeles in the first place.

That case came back to Honolulu. Judge King, who was the chief judge, said enough has been said about nolo and so forth; I am taking over this case. And he said——

Mr. SHORT. Judge King was the chief judge at that time?

Mr. FONG. Judge King was the chief judge in Hawaii. He still is the chief judge now.

Mr. SHORT. At the time of the transfer, was Judge Pence the chief judge?

Mr. FONG. He may have been. He was still a very active judge at that time, of course. But I think Judge Pence was chief judge at the time when it first went on rule 20.

Mr. SHORT. Judge Pence had not taken senior status?

Mr. FONG. I do not believe he had yet at that time.

Then Judge King became chief judge. Judge King says: I am taking that case; there will be no plea bargain; there will be no deals made; I will not accept nolo contendere; I will not listen to any recommendations. He will listen to it, but he says: I am not bound by any recommendations. And the defendant plead guilty and was sentenced by Judge King.

Mr. SHORT. Without objection, we will enter a copy of the transcript of those proceedings into the record that does show that Judge Pence ruled on that motion, rule 20 motion.

[Material referred to follows:]

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF HAWAII

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JUN 16 1975

at 9 o'clock and — min. — M.
WALTER A. Y. H. CHINN, CLERK
by
Deputy

UNITED STATES OF AMERICA,
Plaintiff,
vs.
UNITED HAWAIIAN REALTY CORPORATION, a corporation, et al.,
Defendants.

CRIMINAL NO. 74-69
CRIMINAL NO. 74-106

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Thursday, March 20, 1975, 11:30 A.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE MARTIN PENCE, Judge.

APPEARANCES:

HAROLD M. FONG, Esq.
United States Attorney
District of Hawaii
Honolulu, Hawaii

Attorney for Plaintiff;

HOWARD K. HODDICK, Esq.
Anthony, Hoddick, Reinwald & O'Connor
Ninth Floor
333 Queen Street
Honolulu, Hawaii

JON T. MIHO, Esq.
Suite 1500 - Pacific Trade Center
190 South King Street
Honolulu, Hawaii

Attorneys for Defendant Mung Yee, aka Mung Yee Yap.

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THE COURT: Now where are we in the United Investment and, particularly, the Defendant Mung Yee, is it?

MR. HODDICK: Mung Yee.

THE COURT: Where are we in that case?

MR. MIHO: I think it's concluded, Your Honor. All that has to happen is ---

THE COURT: Wait a minute. The reason I ask is because in the record I had ordered that an up-to-date doctor's report be supplied by the 17th of March. There's a memo in there you are supposed to have an up-to-date one because the last one is last year.

MR. MIHO: Your Honor, I think attached to the motion is an up-to-date doctor's report.

THE COURT: Maybe I missed it. What does it say?

MR. FONG: Are you talking about Dr. Owen Kwong (Phonetic)?

MR. MIHO: Right, and I believe that is dated March 12, Your Honor.

THE COURT: All right. I missed that. (Perusing documents).

What's going to be the government's position on this motion?

MR. FONG: We've tried to resolve this case in its entirety before Mr. McCorriston left the office, without success due to the fact that Mung Yee could not return to this jurisdiction on information from the attorneys of his treatment on the West Coast. The government would like to now resolve this matter by having Mung Yee sentenced, if the Court would accept the offer of pleading no contest to which the government does not object, and if the Court denies that offer, then as stated, I think, between Mr. Hoddick and Mr. McCorriston, there will be other disposition taken by the defendant relative to his offered plea.

We feel that after Mung Yee is sentenced, we can thereafter take action on the other seven defendants that are currently pending. No one has stepped forward ---

THE COURT: Well, this is a motion to transfer.

MR. FONG: That is right. That -- I'm saying this only as preliminary understanding on the Court's part -- the fact that we would have no objection ---

THE COURT: To the transfer.

MR. FONG: --- that he be transferred. We'd like to resolve the thing as soon as possible. It is important to us that he be sentenced so that his matter is resolved in this case.

THE COURT: I think there has been a presentence report already made, hasn't it?

MR. HODDICK: Yes, Your Honor. You may recall that at the time we moved for ---

THE COURT: When we thought there were going to be

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new rules going into effect.

MR. HODDICK: That's right.

THE COURT: The government having no objection, this Court will sign the necessary papers transferring it. Prepare the papers.

MR. HODDICK: (Affirmative nod).

MR. MIHO: (Affirmative nod).

MR. HODDICK: What is the procedure? I simply don't know. I haven't been on this side of the court enough.

THE COURT: What's that again?

MR. HODDICK: The procedure in terms -- is the presentence report then forwarded to the court there?

THE COURT: Yes, yes.

MR. MIHO: Well ---

THE COURT: The Clerk will see to that. Get an order for me transferring it and ... . Okay.

MR. MIHO: Thank you.

THE COURT: Don't need to come up Monday.

MR. MIHO: Thank you, Your Honor.

MR. FONG: What was happening on Monday?

MR. MIHO: A motion was ---

MR. FONG: I don't read the notice page because ---

MR. HODDICK: Your secretary has it in your books.

MR. FONG: --- well, we don't usually get the kind of notice ... . I wanted to talk about another problem, but --

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THE COURT: Okay. Thank you.

MR. MIHO: Thank you, Your Honor.

THE COURT: See you mahope.

MR. HODDICK: Thank you, Judge.

(Whereupon, the proceedings adjourned at 11:40 A.M., March 20, 1975.)

I, Terrence Chun, Official Court Reporter, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Criminal Nos. 74-69 and 74-106, United States of America vs. Mung Yee, et al., at Honolulu, Hawaii, on March 20, 1975, before the Honorable Martin Pence, United States District Judge.

June 14, 1975

Mr. **Short**. We will now stand in recess pending the return of the chairman.

[Recess taken from 3:00 p.m. to 3:10 p.m.]

The **Chairman**. Mr. Fong, do you have anything else you want to say to the committee?

Mr. **Fong**. Nothing further, Mr. Chairman.

Mr. **Gelacak**. Mr. Fong, would you explain for the record the circumstances surrounding the plea bargain entered into with Hal Hansen in *Kukui Plaza* case and its relation or lack of relationship to the State prosecution in that matter?

Mr. **Fong**. When a decision was made to proceed with prosecution in the Federal case and the indictment came forward, we were asked by Mr. Larry Wiseman what position we would take with respect to a plea on this case. In Hawaii the kinds of sentences that one would normally get for a tax evasion case runs between 6 months to a year, especially a person who has not had any kind of a record. I said that we would take, first of all, a hard position against Mr. Hal Hansen because he was needed as a State's witness. Anything that he would do to cooperate with the State would obviously inure to his benefit by our having to advise the Federal judge at the time of sentencing the degree and manner of his cooperation. Of course, now, Benjamin Civiletti, who was then Assistant Attorney General in charge of the Criminal Division, had advised me that, if he does not cooperate, that we should also advise him that that would come down hard on him.

I had taken the position that we should—if he plead guilty to both the tax charge and the wire fraud charge, that we would go 18 months. Originally, there was some talk about 3 years or more. But there was a reason why I came down to 18 months. The key witness that the Federal Government had was this person that I had talked about earlier, Mr. Joseph Zbin. Unbeknownst to anyone except, obviously, to the Federal agencies and myself, we were investigating Mr. Zbin for counterfeit charges which, by the way, he was ultimately convicted of and did serve a sentence in Federal prison for that. Mr. Zbin was our key witness. We had to secure a plea when we did. We did go through with it. Because he had not cooperated I felt it necessary to recommend the maximum that we had originally agreed to, which was 18 months.

The **Chairman**. Mr. Stewart, would you come up please? Hold up your hand and be sworn please.

Do you solemnly swear the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Stewart**. I do.

TESTIMONY OF GEOFFREY STEWART, SPECIAL COUNSEL TO THE OFFICE OF LEGAL POLICIES, U.S. DEPARTMENT OF JUSTICE

The **Chairman**. Mr. Stewart, you are the special counsel to the Assistant Attorney General for Legal Policy; is that correct?

Mr. **Stewart**. Yes, Mr. Chairman.

The **Chairman**. Will you please tell the committee the results of the Department of Justice inquiry into the facts surrounding the prosecution of Hal Hansen for income tax violations?

Mr. **Stewart**. Yes, sir, under the procedures in existence during the period 1976–78, it was necessary for the Department of Justice's Tax Division to authorize a grand jury investigation of tax crimes before such an investigation could be undertaken by any U.S. attorney's office. It was also necessary that a U.S. attorney obtain the approval of the Tax Division prior to seeking any indictment concerning tax violations. Thus, all proposed tax charges investigated by a grand jury had to be reviewed and authorized by the Department's Tax Division.

It appears from the file in the Hansen case that the Internal Revenue Service in Honolulu was administratively investigating Hansen, Oceanside Property, Inc., and others for potential tax violations at the same time that the Honolulu strike force was investigating irregularities with respect to the Kukui Plaza project.

In October of 1976 the Internal Revenue Service apparently concluded that an administrative investigation might create problems with respect to a parallel investigation by the U.S. attorney's office strike force into the same matter. Therefore, on October 6, 1976, through proper channels, IRS regional counsel requested the Tax Division to authorize a tax grand jury investigation of the Kukui Plaza events involving Halfton Hansen and others. Such a tax grand jury investigation was authorized by the Tax Division on October 12, 1976.

A grand jury investigation of potential tax crimes was conducted by the U.S. Attorney's Office in Hawaii with the assistance of special agents of the Internal Revenue Service assigned to assist for that purpose. In the early spring of 1977, the IRS special agent assisting the grand jury prepared a report recommending that Hansen be prosecuted for evasion and false return violations pertaining to his tax returns for the years 1971-74. These recommendations were reviewed and adopted by the regional counsel of the Internal Revenue Service.

The matter was then forwarded to the Tax Division on March 11, 1977, for our review and final decision as to the tax prosecution of Hansen. On March 15, 1977, the Tax Division authorized the tax prosecution of Hansen for false return violations pertaining to his returns for the years 1972 through 1974.

The **Chairman**. Mr. Stewart, could I interrupt you there and ask a question? As I understand, Mayor Fasi was not indicted by the State until March 21, 1977, approximately 1 week after the Tax Division authorized prosecution of Hansen. Is that correct?

Mr. **Stewart**. Yes, sir.

The **Chairman**. You may proceed.

Mr. **Stewart**. On March 28, 1977, having been advised of the State's indictment of Frank Fasi and Harry Chung and the fact that Hawaii had given Hansen immunity, the Tax Division suspended the authorization of the Hansen prosecution in order to restudy their authorization in light of the foregoing facts.

The **Chairman**. Could I ask you a question right after that? So, after the Tax Division learned of the State's indictment, they withdrew Mr. Fong's authorization to proceed pending the study of the strength of the State's case; is that correct?

Mr. **Stewart**. Yes, Mr. Chairman.

The **Chairman**. You may proceed.

Mr. **Stewart**. The case was then reviewed through normal channels within the Tax Division. However, a final determination on the question of prosecution by the Tax Division was delayed somewhat because of the need on two occasions to obtain further views and information of the Internal Revenue Service attorneys, that is, the regional counsel. Eventually, Assistant Attorney General M. Carr Ferguson authorized the prosecution of Hansen for false return violations for the years 1972 through 1974. That authorization was given to Mr. Fong on September 28, 1977.

Subsequent to the Tax Division's authorization to prosecute, Mr. Fong had a discussion with acting chief Stanley F. Krysa concerning a possible guilty plea by Hansen to one tax count if the Government recommended probation for Hansen. Though the Tax Division has a policy of not making any recommendations with respect to sentencing, it is the policy that, if asked by the court for recommendation, the Government will ask for substantial jail time.

In the course of the discussion with respect to a possible plea, the Tax Division through Mr. Krysa tentatively agreed with Mr. Fong that, if the circumstances arose, the government would seek a maximum of a 3-year sentence under any guilty plea. In a superseding indictment, Hansen was then indicted on October 12, 1977, on three counts of filing false tax returns which the Tax Division had authorized. Eventually, in June 1978, Hansen plead guilty to one tax count and was sentenced to an 18-month jail term.

The handling and the disposition of the Hansen case for the U.S. attorney's office, that is, the acceptance of a guilty plea to one felony count, was done in accordance with the policies and the procedures of the Tax Division in criminal tax cases.

The chronology of the Justice Department's authorization to Mr. Fong concerning the Hansen investigation and prosecution is as follows. On October 12, 1976, the Tax Division authorized a tax grand jury investigation concerning potential tax violations by Hansen and others. The U.S. attorney was directed at that time to conduct such an investigation. When that investigation was concluded, the Tax Division was requested to review and approve the proposed tax changes in accordance with the procedures in effect. The Tax Division then reviewed the prosecution recommendations and authorized three felony tax violations to be prosecuted against Hansen on March 15, 1977. The Tax Division's authority for that prosecution was suspended on March 28, 1977, in order that it could further review the Hansen charges in light of the intervening immunity given Hansen by the State of Hawaii and the Fasi indictment.

Ultimately, the Hansen tax prosecution was again authorized and eventually concluded with a guilty plea to one tax felony.

The **Chairman**. Now I want to interrupt you again. Would you mind answering a question at this point? Mr. Stewart, what you have said then is that the Department of Justice and the Tax Division in Washington were really responsible for the final decision concerning the tax charges as well as the time they were brought and not Mr. Fong. Is that correct?

Mr. **Stewart**. Absolutely, Mr. Chairman.

The CHAIRMAN. I have one more question. I think that will complete my questions. Mr. Stewart, was Mr. Fong the U.S. attorney at the time Mr. Hansen was sentenced?

Mr. STEWART. No, Mr. Chairman. Mr. Fong was no longer the U.S. attorney for the District of Hawaii. I believe Mr. Hein, his successor, was the U.S. attorney at the time Mr. Hansen was sentenced.

The CHAIRMAN. I believe you have a chronology of events that you prepared there. Without objection, that can be placed in the record at this point.

[Material referred to follows:]

CHRONOLOGY RE HANSEN TAX INVESTIGATION AND TAX PROSECUTION

March 1976—An informant contacted IRS Intelligence, Honolulu, and provide information regarding potential tax violations by Halftan Hansen, and Oceanside Properties, Inc.

March to August 1976—Honolulu IRS administratively investigating Hansen, Oceanside Properties, Inc., and the Kukui Plaza Project—intensity of investigation unknown.

September 22, 1976—United States Attorney Fong by letter requests of Commissioner of IRS disclosure of tax information relative to 10 people including Hansen, Frank Fasi, then Mayor of Honolulu, Harry C. Chung an associates of Fasi.

October 6, 1976—San Francisco, Regional Counsel, IRS, by letter to Tax Division requests grand jury investigation authorization to investigate Kukui Plaza Project involving Halftan Hansen.

October 12, 1976—Tax Division authorizes tax grand jury investigation of Kukui Plaza Project, Hansen and other individuals.

March 11, 1977—IRS, Regional Counsel, recommends prosecution of Hansen for violation of 26 U.S.C. 7201, 7206(1) for the years 1971-74.

March 15, 1977—Tax Division authorizes prosecution of Hansen for violation of 7206(1) for the years 1972-74.

March 28, 1977—Tax Division suspends authorization of Hansen prosecution in order to rereview the case in light of the State's indictment of Fasi and Chung and the fact that the State had given Hansen immunity.

April 6, 1977—Tax Division Trial Attorney Barrish again recommends prosecution of Hansen per 7206(1) for the years 1972-74.

April 20, 1977—Assistant Chief Ahlen concurs in 7206(1) prosecution.

April 29, 1977—Assistant Chief Vellines recommends decline.

May 2, 1977—Criminal Section Chief Namorato recommends prosecution per 7206(1) charges.

May 18, 1977—Acting Assistant Attorney General Baum recommends we obtain additional views from Regional Counsel.

July 12, 1977—Regional Counsel responds and again recommends prosecution per 7201 evasion and 7206(1) false returns.

August 18, 1977—Letter to Tax Division from Larry Zinker, Assistant Attorney General, Hawaii, informing of Hansen immunity, the fact that he was the State's chief witness in the Fasi case and requesting any favorable consideration that might be extended to Hansen.

August 18, 1977—Special Agent Mijo, IRS, Honolulu, called Tax Division requesting status of Hansen prosecution consideration indicating that Fong was expecting to indict Hansen on mail fraud charges.

August 29, 1977—Supplemental memorandum by Trial Attorney Barrish again recommending 7206(1) prosecution for the years 1972-74.

August 30, 1977—Assistant Chief Ahlen recommends decline.

August 30, 1977—Assistant Chief Alexander recommends no prosecution but further grand jury investigation.

August 30, 1977—Hanson indicted on mail fraud charges.

September 2, 1977—Assistant Chief Vellines recommends decline.

September 2, 1977—Letter from Special Prosecutor of Fasi case, Grant Cooper, to Tax Division requesting that no action be taken on any further indictment of Hansen on tax charges.

September 12, 1977—Acting Criminal Section Chief Krysa recommends prosecution of Hansen per 7206(1) for the years 1972-74.

September 13, 1977—Acting Deputy Assistant Attorney General Namorato requests further information from Regional Counsel re progress of IRS investigation per other targets of Kukui Plaza Project investigation.

September 23, 1977—Acting Criminal Section Chief Krysa, after receiving information from IRS, again recommends prosecution of Hansen per 7206(1).

September 26, 1977—Acting Deputy Assistant Attorney General Namorato concurs in recommendation to prosecution Hansen.

September 28, 1977—Assistant Attorney General Ferguson authorizes prosecution of Hansen on 7206(1) charges.

September 29, 1977—Discussion by USA Fong with Acting Chief Krysa concerning a possible plea by Hansen provided the Government recommended probation. Fong and Krysa oppose probation, both tentatively agree to seek a maximum three year sentence on any plea.

October 6, 1977—Prosecution authorization letter forwarded to the USA.

October 11, 1977—Assistant Attorney General Civiletti advised Tax Division he was to confer with State prosecutor, Grant Cooper. Civiletti requested someone from Tax to attend. Tax advised no one from Tax would attend.

October 11, 1977—Telephone conference—Krysa and Fong re Cooper conference with Civiletti. Cooper had spoken with Fong seeking to allow Hansen to plead guilty to one count of mail fraud with the Government recommending probation. Per prior discussion with Tax Division, it was agreed Government opposed probation for Hansen. Fong advised he would proceed with indictment of Hansen for tax charges as authorized by Tax Division.

October 12, 1977—Hansen indicted for three counts of false tax returns, 7206(1).

November 23, 1977—Assistant Attorney General Ferguson and Fong discuss possible plea by Hansen with Government advising Court of Hansen's cooperation with State if he testified. No resolution made as no plea offer was pending before the Government.

June 15, 1978—Hansen pleads to one court false return 7206(1) for 1978. Government to recommend 18-month term.

July 1978—Hansen sentenced on 7206(1) Tax count—receives 18-month sentence.

The CHAIRMAN. Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman. Mr. Fong, welcome. I apologize for not being here at the beginning.

Mr. Chairman, I am not going to take this time to ask any questions. The minority staff has gone to Hawaii and thoroughly investigated the allegations.

I am satisfied from the questions and field investigation that we have done, and the line of questioning that you pursued, that there is not a just cause to vote against Mr. Fong to sit on the bench. I have questions that I would like to submit, not for the purpose of holding up the nomination because we can vote even if they are not answered, but I would like a gentleman's agreement from Mr. Fong that he would answer them prior to the time we vote on the floor. They relate to the nominee's view of issues relating to the administration of justice and the legal bounds under which the courts can and should act. They are more substantive questions than questions relating to character. I am satisfied of Mr. Fong's character.

With your permission, Mr. Chairman, I would submit these questions to Mr. Fong and ask him if he could have answered the questions prior to the time we bring his nomination to the floor. That is after recess, is that correct?

The CHAIRMAN. Probably after recess now, yes.

Mr. SHORT. That was to the floor rather than to the committee?

Senator BIDEN. Yes, to the floor. I do not ask that we hold up voting on this committee. I am prepared to vote for Mr. Fong.

The **Chairman**. Thank you. Mr. Fong, you heard the request of Senator Biden, the distinguished ranking member of this committee. So, you will answer the questions that he propounds to you?

Mr. **Fong**. Yes.

The **Chairman**. And get them to him as soon as you can because he would like for them to be answered prior to the action by the full Senate on your confirmation?

Mr. **Fong**. Yes, Mr. Chairman.

The **Chairman**. He will not hold up your confirmation in the committee, but he wants them answered before action is taken on the floor. Is that agreeable with you?

Mr. **Fong**. It is agreeable with me. Did you want a written response?

Senator **Biden**. Yes. It would be easier if we had a written response. There are only about eight questions, and they are not very indepth.

The **Chairman**. I would suggest that you do it while you are in Washington. You are welcome to use the facilities of the Judiciary Committee to assist you, if you wish, with a typewriter or a secretary if you would like to do that. It would probably save time.

Mr. **Fong**. Yes, thank you.

Senator **Biden**. I have no other questions.

The **Chairman**. Those are all the questions we have, Mr. Fong. I wish you a happy tenure of service on the bench.

Senator **Biden**. One that we all envy—tenure, that is.

Mr. **Fong**. Thank you.

[Subsequent to the hearing the committee received the following information:]

QUESTIONS OF SENATOR BIDEN AND RESPONSES OF MR. FONG

Question. What is your feeling that on balance the Federal judiciary is not more qualified than State judiciaries to interpret the Constitution of the United States of America?

Answer. I would tend to agree that the Federal judiciary should not be more qualified than the State judiciary to interpret the Constitution of the United States. However, because of the nature of the cases and the jurisdiction of the court to decide matters in accordance with federal statutes, a federal judge would be more exposed than would be a state judge to situations where the question of constitutionality under the U.S. Constitution would be in issue. As such a federal judge is required to be more attuned to the most recent cases and trends as they affect the constitutionality of statutory interpretation.

Question. How much impact did the exclusionary rule and the Miranda rule on confessions actually have on prosecutions that you have dealt with?

And how much effect has the exclusionary rule had in the area of crime rate and drug enforcement?

Answer. The expansion of the exclusionary rule and the Miranda rule during the days of the Warren court was intended to safeguard an individual's constitutional rights against certain police abuses and excesses. In my nine years as a prosecutor in the U.S. Attorney's office I noticed no appreciable effect on the crime rate as a result of the exclusionary rule or the Miranda rule. While a few cases may have been dismissed because of illegal search and seizure, none of the major narcotic cases were ever affected. This was in great measure due to the competence of federal law enforcement agents who were able to establish new agency guidelines to conform their investigative conduct to the requirements set forth in Miranda type situations and new cases on search and seizure.

Question. Do you believe it would be helpful to you as a U.S. District Court Judge to have a sentencing commission to establish uniformity in sentencing?

Answer. I do not believe it is necessary to have a sentencing commission to establish uniformity in sentencing. I say this despite the fact that as U.S. Attorney I was aware of the variances in sentences among the different federal judicial districts. As a case in point, during those days when draft evasion was being prosecuted, it was generally thought that federal judicial districts in many Southern states imposed harsher sentences of incarceration upon conviction whereas many district courts in large Northeastern states imposed probation. These variances however could be minimized if not reduced by publication of trends in sentencing so that each federal judicial district would be aware and perhaps influenced by what goes on in other districts. It is however, very important that sentences within the same federal judicial district conform as much as possible to uniformity so that "judge shopping" could be avoided. In Hawaii, this being a two judge district, each judge gets to recommend his sentence to the sentencing judge. This has resulted in a desirable uniformity in sentences within the same district.

Question. How would you resolve any potential conflict of interest, including the procedure you would follow in determining these areas of concern?

What action would you take should any conflict arise other than that dealing with a business relationship in which you were involved?

Answer. If any potential conflict of interest should arise I would advise both sides and make a disclosure of the same on the record and recuse myself from making any decision on the matter. The areas of potential conflict of interest would include all former clients and business associates of mine as well as clients to be represented by my present law firm or by former partners and associates, such as Jack Mizuha and Edward Y. N. Kim, with whom I was previously associated in the practice of law in 1968–1969, prior to my service in the U.S. Attorney's office. I would also disclose on the record any stock holdings I may have at the time in a corporation or business enterprise which is a party litigant or a third party beneficiary of any action or suit in my court and offer to recuse mayself in those instances.

Question. Prisoner petitions comprise approximately 14 percent of all district court civil litigation filings. Do you feel that there is a need to alter the degree of access to federal court by state prisoners and if so how would you recommend that it be done?

Answer. I would favor a drastic change in the law to restrict ready access to federal courts by prisoner petitions. Just as in Social Security benefit appeals, prisoner petitions should be referred to several levels of administrative hearings and appeals before coming to federal court. Legislation could provide that most appeals within the administrative level be final with no appeal to federal court. Access to federal court should only be allowed in those few cases where clear violations of constitutional rights are alleged and shown. In those limited cases the only criteria for federal jurisdiction should be to consider whether due process was observed in the conduct of the hearing. There should be no right to de novo hearing on the merits of the petition in federal court.

Question. The dilemma for a judge is how to resolve a conflict between your own conscience and your own personal sense of justice and what is the inescapable and clear mandate of a statute or constitutional provision of law. How should that be resolved?

Answer. There is no question or hesitation that in the event or a conflict between my own conscience and personal sense of justice and what is the inescapable and clear mandate of a statute or consitutional provision of law that may personal views will be subordinated to the mandate of the law. I can envision no situation where such a conflict could result in my recusing myself from handling any case.

Question. Would you be willing, as a judge, with the power you would have on the court to disregard the intent of the framers of the Constitution and change it to achieve a result that you thought might be desirable for society?

Answer. A federal judge is sworn to interpret and uphold the law as expressed in statute as well as the Constitution. To disregard the intent of the Constitution and change it to achieve a result I personally thought might be desirable for society is an example of judicial legislation which I consider to be a clear violation of the concept of separate and equal branches of the government. Any need for social changes is the clear function of the legislature to enact and the executive to carry out. The judicial function is to determine the legislative intent of any statute or the intent of the framers of the Constitution and apply that law to a set of given facts.

Question. It has been remarked, "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." Do you share this judgment that was expressed by Mr. Justice Holmes? (Kepner v. U.S., 195 U.S. 100, 134 (1904).)

Answer. The rights of man as enunciated in our Constitution are the foundations of freedom with our democracy. They must be protected and guaranteed at all costs. If in the application of these rights a criminal should escape justice, this may be a necessary evil when weighed against the denial of our fundamental rights which would then give rise to the evils of tyranny. This does not always mean of course that the expression of individual rights should be paramount to the rights of others or the group or the community. In summary the constitutional rights of an individual should always be protected but it should be applied with due consideration for the equal rights of others.

Question. What kind of guidelines do you believe a judge should follow in determining the propriety of federal intervention into state affairs?

Answer. A federal judge should be very cautious and reluctant to intervene into state affairs. Instead of intervention by the use of appointment of marshals or trustees to take over and handle purely state functions, a federal judge should, as much as possible, keep the state in complete control of its own functions and only decide and order if necessary modifications of state handling to conform with federal statute or constitutional requirements. A judge should recognize the right of the state to handle its own affairs unless the state has clearly demonstrated after repeated warnings that it is either unable or unwilling to conform to higher statutory or constitutional mandate.

Question. What is your feeling on having lawyers receive special training before being allowed to practice in the federal courts?

Answer. I do not believe a lawyer should receive special training before practicing in federal courts. I have seen over the years a higher caliber of professionalism practiced in the federal courts. This seems to be a natural tendancy in federal practice. As always there will be those whose professional conduct falls below the norm expected in federal practice. But they are few in number so as to preclude the necessity of special training and avoid the obvious criticism of eliticism among practitioners.

Question. What do you feel is the best way to relieve the heavy case load of the district courts, and are the magistrates, in your opinion, the best qualified to act in the place of the federal district judge?

Answer. The solution lies in the numbers game. More judges to handle a growing population and an increasingly litigious public is the obvious solution. Given however, the reluctance to create new judgeships, the powers if not the numbers of federal magistrates should be increased in order that they handle more pretrial, non-dispositive matters to give more time to the trial judges to handle trials and move the cases. Legislation should provide that magistrates try more cases of limited jurisdiction as a matter of right or not as presently provided that trial before a magistrate shall only be upon stipulation of the parties.

Question. Do you feel that one of the primary functions that a judge can serve is to expedite and get work at the trial level done?

Answer. One of the primary functions of the District Court judge is to manage his assigned caseload to provide for expeditious adjudication of issues in motion and trial. Judges owe an obligation to cut down the back log of cases so that speedy trial, already provided by statute in criminal cases would also be assured in civil cases. The rights of the party litigants should be the paramount factor and not the individual schedule of the attorneys. A judge will have discharged his duty if he has done all that he could to bring to issue and trial the rights and obligations of the contending parties as expeditiously as possible.

The CHAIRMAN. I understand that you have the support of some of your classmates.

Mr. FONG. I do, Mr. Chairman. I have been in class now with 43 other Federal judges. I find myself in the unique position of being the only one of the class of 44 judges who has not yet been confirmed. They did send me their best wishes. As a matter of fact, I think the judge from South Carolina is here.

The CHAIRMAN. Yes, I see Judge Wilkins back there now. Judge Wilkins, did you want to make a brief statement in his behalf?

Mr. WILKINS. I want to say, Senator, that we have been with Mr. Fong for the last week in class. We have gotten to know him. We all wish him the best. From his reputation we understand he will make an outstanding Federal judge. I am here to see you, Mr. Chairman, and also to tell Mr. Fong we wish him the best.

The CHAIRMAN. Thank you very much.

The committee stands adjourned.

[Whereupon, at 3:25 p.m., the committee was adjourned.]

BIOGRAPHY

HAROLD M. FONG

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF HAWAII

Birth: April 28, 1938, Honolulu, Hawaii.

Legal residence: Hawaii.

Marital status: Married to Judith Tom Fong, 2 children.

Education: 1956-60—University of Southern California, A.B. degree; 1960-61—George Washington Law Center; 1961-64—Michigan Law School LL.B. degree.

Bar: 1965—Hawaii.

Experience: 1964-65—Law clerk to Associate Justice Jack H. Mizuha Hawaii Supreme Court; 1965-68—Deputy prosecuting attorney, city and County of Honolulu; 1968-69—Private practice in association with Jack Mizuha and Edward Kim 1969-73—Assistant U.S. attorney, District of Hawaii; 1973—U.S. attorney (court appointed), District of Hawaii; 1973-1978—U.S. attorney (Presidential) District of Hawaii. 1978 to present—partner, Fong & Miho.

CONFIRMATION HEARING ON:

HENRY A. MENTZ, JR., JOHN P. MOORE, AND THOMAS PENFIELD JACKSON

WEDNESDAY, JUNE 16, 1982

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2:30 p.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Duke Short, chief investigator; Bill Christensen, investigator; and Pamela Swanner, clerk.

NOMINATION OF THOMAS P. JACKSON, JOHN P. MOORE, AND HENRY A. MENTZ, JR.

The **Chairman**. The committee will come to order.

Today, we have three U.S. district court judges, Mr. Thomas P. Jackson of the District of Columbia, to be U.S. district judge for the District of Columbia; Judge John P. Moore, of Colorado, to be U.S. district judge for the District of Colorado; and Mr. Henry A. Mentz, Jr., of Louisiana, to be U.S. district judge for the Eastern District of Louisiana.

Now, we don't have many Senators from the District to take him. The Senators are so busy we had better take them first. In order of seniority. I think Senator Long outranks us all. Senator Long, would you come up and bring your man? We will be glad to hear from you.

Congressman Moore, you are with them, too, are you not? Come up and have a seat on the other side.

You will be sworn. Just the judge, Senator.

The evidence you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Mentz**. I do.

The **Chairman**. Mr. Henry A. Mentz of Louisiana. We will be glad to hear from you, if you have any statement you wish to make to the committee. Your biography will be made part of the record.

Mr. **Mentz**. I certainly appreciate the opportunity to come before the committee, Mr. Chairman, and I am certainly glad that Senator Long and Congressman Henson Moore were able to be present with me today.

The **Chairman**. Any other statement you wish to make?

Mr. **Mentz**. No, sir.

The CHAIRMAN. I have a few questions to ask you, but there is no use to keep the Senator and Congressman waiting. I can let them make their statements and then excuse them.

Senator Long, it is a pleasure to have you. I think you are next to the senior Member of the Senate.

Senator LONG. Yes.

The CHAIRMAN. We are glad to hear from you.

STATEMENT OF HON. RUSSELL B. LONG, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator LONG. Thank you, Mr. CHAIRMAN.

Mr. Chairman, I am pleased to appear here to introduce Henry Mentz, Jr., as the nominee for the Federal district judge for the Eastern District of Louisiana. In my opinion, the President has made a very excellent selection. It was my privilege to know Henry Mentz as a classmate at Louisiana State University where he was admired and personally liked by all of his peers in LSU Law School. Later on, I was privileged to work side by side with him as legislative counsel for the Governor of Louisiana. Wherever he has gone, his high standards and strong sense of morality as well as his good sense of humor have caused him to be held in the highest esteem by all those privileged to know him.

He served honorably in the U.S. Army from 1943 to 1946. In 1946, he entered private practice in Hammond, La., accumulating a broad legal experience. For 6 years he served as city attorney for that city. He has been senior partner of his own firm since 1955, and he is a member of the 21st Judicial Bar Association—1st District Bar Association—and served as president of that association for 2 years.

Mr. Mentz also served as chairman of the standing committee on legal aid as a member of the House of Delegates for 2 years in the Louisiana Bar Association. He has served as chairman of the Indigent Defender Board for the 21st Judicial District Court. Henry Mentz is a very competent, conscientious lawyer who has experience, knowledge, and judicial temperament to perform admirably on the Federal bench. I am happy to, and strongly, recommend his nomination.

Mr. Chairman, my colleague, Senator Bennett Johnston, was unable to be here today. The President asked him to go to Saudi Arabia to attend memorial services at the death of the late King Khalid, and he has asked me to submit a statement on his behalf supporting what I have said here, Mr. Chairman.

I request that the prepared statement of Senator Johnston be submitted into the record.

The CHAIRMAN. Without objection his statement will be included in the record.

[The prepared statement of Senator Johnston follows:]

PREPARED STATEMENT OF SENATOR J. BENNETT JOHNSTON

Mr. Chairman and members of the committee, I am pleased to commend to your attention a distinguished lawyer and citizen of Louisiana, Henry Alvan Mentz, Jr., of Hammond who has been nominated to serve on the U.S. District Court for the Eastern District of Louisiana.

Mr. Mentz, a lifelong resident of Louisiana, is a graduate of Tulane University and received his LL.B. from Louisiana State University where he was on the Law

Review Board of Editors. Throughout his professional career, he has worked to bring the benefits of law and civic improvement to his state and community.

A member of the Louisiana State, American and International Bar Associations, he has served as president of the 21st Judicial District Bar, and has just completed a three-year term as chairman of the District Indigent Defender Board. He has also been chairman of the Standing Committee on Legal Aid of the Louisiana Bar, which organized local bar associations to establish legal aid units.

Mr. Mentz has been in the general practice of law in Hammond since 1948, representing a wide range of clients. During the first 20 years of his practice, he handled a number of criminal cases including *State of Louisiana* v. *Turner* which is reported in 379 U.S. 466, 85 Sup. Ct. 546, 13 L. Ed. 2nd 424 (1965). He is familiar with the judicial system, as is evidenced by his chairmanship of the Crime and Justice Committee of Priorities for Louisiana, Baton Rouge Region. As chairman of the Crime and Justice Committee, Council for a Better Louisiana, he reported to the governor and legislature on recommendations to improve the judicial system.

Both the legal profession and the public have reason to be grateful to Mr. Mentz for his efforts on behalf of legal aid. He has, in addition, been active in the Hammond Chamber of Commerce and the Rotary Club, and has led fund drives for the Red Cross and the March of Dimes. He is currently president of the Louisiana Civil Service League. His wife of 26 years, Ann, is president of the local Arts Council and a director of the Louisiana Council for Music and the Performing Arts. Together, they have established an enviable standard for community service.

I am honored to present Mr. Mentz to this committee for its consideration. He is a fine lawyer and a devoted family man who served his country during World War II with the 65th Infantry in Europe. I believe that his unbroken record of honorable service both to the legal profession and to the larger community of Hammond and the state of Louisiana equip him to serve with distinction on this court.

The **Chairman**. Now, we will be glad to hear from you, Congressman Moore.

STATEMENT OF HON. W. HENSON MOORE, A U.S. REPRESENTATIVE FROM THE STATE OF LOUISIANA

Mr. **Moore**. Thank you, Mr. Chairman.

I simply would like to add very briefly to the very fine remarks made by the distinguished dean of our Louisiana delegation, Senator Long. I have had the privilege of knowing Henry Mentz for about 10 years. He is a constituent of mine. When we sat down about a year ago to begin to search for names to nominate to the President for judge for the Eastern District of Louisiana, Henry was first on the list, at the very top of the list, and is the first person Louisiana has submitted to the Reagan administration for judicial appointment.

We think he has a very distinguished record of civic service. He is known as a gentleman from the district I represent. He also served, as the Senator indicated, as president of his bar association, which covers three parishes, which most folks erroneously call counties. He is someone who has been very active throughout his community, well known to people well beyond his community.

A distinguished attorney, he has been very active in all walks of life. One of the interesting things about him is when the bar association was doing its examination of him, reports came back about his demeanor and his temperament. For those of us who practiced law before Federal judges, very often we found out that Federal judges become somewhat imperial when they ascend the bench, and it is going to be refreshing to find a gentleman who is considerate of his former colleagues in the bar.

Mr. Chairman, one other point that we were very, very concerned about was that the people we nominate to the President of the United States, to be ultimately appointed, are people who are going to be judges and not lawmakers, who wear black robes and are nonelected. I think we can guarantee to you that this gentleman is going to be a judge who will leave the lawmaking up to the Congress of the United States, and carry out the laws determined by Congress.

He understands the division of powers of the Government. So we are very happy, very pleased, and unanimously endorse his selection to you for approval.

The **CHAIRMAN**. Thank you very much.

Mr. Mentz, you are fortunate to have such high endorsement from such an able Senator as Senator Long, and also from such an able Congressman as Congressman Moore.

We will excuse these gentlemen now if they wish to go, the Senator and the Congressman, or they can stay if they wish, and to save time now, I am going to take Senator Armstrong and let him present the judge from his State, Judge Moore.

Senator **ARMSTRONG**. Mr. Chairman, thank you very much for giving me the opportunity to be here.

The **CHAIRMAN**. We are glad to have you with us, Senator.

STATEMENT OF HON. WILLIAM L. ARMSTRONG, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator **ARMSTRONG**. I appreciate the courtesy to proceed out of order so I can excuse myself and go to another meeting where I am expected to attend this afternoon, and I will respond in the same way by being brief, because I know the committee has a good deal of business to transact today.

Mr. Chairman, the routine expression of courteous remarks is the norm on an occasion like this, and in fact I feel somewhat impoverished by the fact that it is so customary for people in my position on an occasion like this to use flowery words to speak well of the person who had been nominated to become the U.S. district judge, that we have in effect suffered from inflation of the language.

All the words which I feel in my heart to express my admiration for the nominee have already been used on other occasions, and it is hard for me to find the words that adequately express what a fine nomination the President has sent to the Senate for its confirmation.

Let me do two things if I may. First, I would like to submit for the record a written statement which discusses Judge John Moore's background and qualifications and professional experiences, and some of the recorded reasons why he was selected by the President for this position.

Second, I would just like to say, from my own heart more than from any sense of written documentation, my complete and personal, as well as professional, admiration for Judge Moore. He has been a personal friend for more than 20 years. We have known each other in a variety of personal and professional capacities, dating back to the days when we were neighbors in Aurora, Colo., when he was first the deputy attorney general and I was a member of the State legislature, and later on when I was majority leader of the State legislature and he was the attorney general of the State of Colorado.

In 1975, Judge Moore became a bankruptcy judge, where he has served with great distinction. I have heard from many lawyers and judges in the State the kind of response the news of his appointment by the President that reflects, I think, great credit on him and on the conduct of the position which he now holds.

He is a man of great intellectual accomplishment. He is, in addition, a man of great practical wisdom and commonsense and a person of great integrity in whom I think the President has quite properly reposed this high trust.

Finally, Mr. Chairman, if I may say so, Judge Moore brings to the task of serving on the bench both the judgeship which he now holds and in the position to which he has been nominated, a sense of balance and zest for the task, which I think is unusual. He has the temperament and the outlook and the desire itself, which leads me to believe that he will not only serve capably, but indeed that he will become an outstanding leader of the judiciary in this country.

So I thank you for the opportunity to appear this afternoon and, of course, urge the committee to recommend his approval.

[The prepared statement of Senator Armstrong follows:]

PREPARED STATEMENT OF SENATOR WILLIAM L. ARMSTRONG

Mr. Chairman, it is my honor and great pleasure to appear before the Committee today and introduce a first-class jurist, a fine human being and a personal friend for nearly twenty years—Judge John P. Moore of Denver.

As the Committee is aware, Judge Moore has been nominated to serve as U.S. District Judge for Colorado to fill the vacancy created when Judge Fred Winner decided to take senior status. I support that nomination in the strongest possible way. In my opinion, no one in Colorado who might be considered for this important post has the proven record of scholarship, professional expertise, judicial temperament and other personal qualifications that Judge Moore would bring to the work of the District Court.

His varied and impressive career has uniquely qualified him for this apointment. A native of Denver, Judge Moore began his undergraduate studies at Stanford University and completed them at the University of Denver. He also studied law at the University of Denver, while clerking at the Denver Superior Court, and received his law degree in 1959. Three years of private practice were followed by a rapid succession of public responsibilities: first as Assistant Attorney General, then Deputy Attorney General and, in 1972, he became Attorney General of the state of Colorado. During this time, when I was in the State Legislature, we had many opportunities to work closely together in our respective professional capacities, and I have a firsthand knowledge of his exceptional competence. In 1975, he was appointed to the U.S. Bankruptcy Court for the District of Colorado, where he currently serves. In all of these positions of considerable responsibility and public trust, Judge Moore has performed his duties with distinction and great credit to himself and his profession.

Moreover, Judge Moore is a devoted family man; he and his wife Joan have raised three children and live in Colorado, as they have for the past 23 years. Despite busy professional and private lives, he has found the time to be an active member of several service clubs and community groups too numerous to mention here, but I would like to give specific recognition to his work with learning-disabled and retarded children, and with troubled teenagers.

Very few people who might be considered for the position of U.S. District Judge have such an extensive and impressive record by which they can be evaluated. In conclusion, Mr. Chairman, John Moore is ideally suited for this post. His personal and professional credentials are impeccable and his record of public service is of the highest order. We in Colorado and the federal bench as a whole need such a man in the U.S. District Court and I commend him to the Committee wholeheartedly and without reservation.

The **Chairman**. Senator, we are glad to have you with us, and I want to congratulate Judge Moore for being endorsed so highly by one of the finest men in this Senate—Senator Armstrong. He is an able, dedicated Senator and held in high esteem by the whole Senate, and we congratulate you, and Senator, we thank you for coming.

Senator **Armstrong**. Thank you, Senator. I am grateful for the opportunity to be here.

The **Chairman**. I see your pretty wife is here. I imagine she wants to associate herself with your remarks.

Senator **Armstrong**. I believe I am authorized to speak for her, Mr. Chairman, on this matter.

TESTIMONY OF HENRY A. MENTZ, JR., NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF LOUISIANA

The **Chairman**. We will take Mr. Mentz first, I believe. If you will come up, Mr. Mentz, I have a few questions I want to propound to you. You have already been sworn.

Do you have any members of your family here that you would like to introduce?

Mr. **Mentz**. No, sir, I don't. Judge McNamara came up here several weeks ago and he didn't bring his wife, and so I thought as a matter of following him that I suggested that my good friend, Judge Carter, come instead of my wife.

The **Chairman**. Who is with you today?

Mr. **Mentz**. Judge Carter. May I present to you, Mr. Chairman, Judge Carter of the Louisiana Court of Appeals, who is a very good friend of mine.

The **Chairman**. It is a privilege to have you here.

Judge **Carter**. It is a privilege to be here.

The **Chairman**. I assume you endorse him?

Judge **Carter**. One million percent.

The **Chairman**. I note you were born in New Orleans. Incidentally, my grandmother was born there, too, so I feel I am partly from Louisiana.

Mr. Mentz, have you been a practicing attorney since 1946?

Mr. **Mentz**. That is correct.

The **Chairman**. And now you have been nominated for the position of U.S. district court judge. What do you feel will be the most rewarding aspect of serving in this capacity?

Mr. **Mentz**. Mr. Chairman, I feel that I do have experience and background to work hard as a district judge. I may just mention in my usual routine I get up at 6 in the morning. I have always gotten to my office at 8 o'clock in the morning, and thank goodness I haven't missed one day's work in the last 8 years, and I have regular habits, and I am willing to devote all the necessary time to keep up with the docket and move the docket along, and I feel that I can perform as a district judge in a manner that will make Senator Long and Congressman Moore and the other gentlemen here proud of me, so that I will deserve the confidence that they have shown in me.

The CHAIRMAN. Mr. Mentz, do you feel your limited criminal trial experience will in any way hinder you in your performance as a Federal judge?

Mr. MENTZ. No, sir. I am in and out of the court all the time on the civil side of the court.

May I add an explanation about the criminal matter? In my district, there was a custom that you served 20 years, free of charge, served the indigent criminals, that at that time you will be excused from that duty. I served my 20 years, and after that we organized an indigent defender board which was partially supported by the national criminal justice fund and partially by the State and partially by criminal charges that were assessed against the local docket, and we have established a very successful indigent criminal program in the area.

Another reason that I did not handle criminal cases is that later on my partner, Judge Leon Ford, had become city judge, and it was felt that I shouldn't handle criminal cases due to that.

But I do not feel that I will have any problem in adjusting to the criminal docket due to the fact that I am a trial attorney, and I am in and out of the court all the time on the civil side of the docket.

The CHAIRMAN. You are familiar with the criminal procedure, and will prepare yourself, I am sure, before you try a case.

Mr. MENTZ. Yes, indeed I will.

The CHAIRMAN. Mr. Mentz, I consider judicial temperament to be a prerequisite for a good Federal judge. Would you please give me your thoughts on this, sir?

Mr. MENTZ. Excuse me, sir. Would you please explain that?

The CHAIRMAN. I just said I consider judicial temperament to be an important requisite and an essential quality of a judge, and I just wondered if you had any comments on that.

Mr. MENTZ. I do feel that I have a balanced temperament, and I think that is one of the main prerequisites of a judge.

As an attorney, you are an advocate. You are supposed to only see one side of the case, and as a judge you have a duty to see both sides, and I feel that I am fortunate to possess a balanced temperament, and that I will be able to see both sides of the problem.

The CHAIRMAN. Mr. Mentz, would you describe the arrangements you have made to dissolve your financial interest in your law firm, particularly what time period is involved and what arrangements have you made to be compensated for your work on pending litigation?

Mr. MENTZ. Mr. Chairman, I filed with Mr. Duke Short this morning a letter of intent by my present partner, and also another attorney who is going to join in purchasing my practice, and you will note that the payout period is 5 years, but I have no problem in reducing that to 3 years if the committee would suggest that.

In other words, I have billed—I am billing—all of my current litigation files up to date, and then the purchase price, of course, represents the sale of the practice, the library, the equipment, and filing system.

The CHAIRMAN. In other words, you have it all wound up in 5 years?

Mr. MENTZ. Yes, sir, but I am sure that it can be reduced.

The CHAIRMAN. You could probably do it in three? Three, I think, would be better if you can.

Mr. MENTZ. I don't anticipate any problem on that.

The CHAIRMAN. Now, I have this letter of intent by you, and we will retain this in the committee's files.

Mr. MENTZ. Thank you, sir.

The CHAIRMAN. Now, Mr. Mentz, the phrase "judicial activism" is often used to show the tendency of the judges to decide on issues beyond the scope of their authority. What does that phrase mean to you?

Mr. MENTZ. Mr. Chairman, I believe there are three separate branches of Government, and I do not feel that any one branch should appropriate to itself functions of the other branches, and when that happens you have a judicial activism problem, and I do believe in those cases judicial restraint is indicated in order to preserve the three separate branches of Government as we know them.

The CHAIRMAN. I think judges bring themselves into disrepute when they attempt to legislate from their positions as judges, and that is the obligation of the Congress, and the Congress makes the law, and the judges interpret the law. Is that your feeling?

Mr. MENTZ. That is correct. I do not feel that it is appropriate at all for the judiciary to invade the legislative powers and prerogatives of the Congress.

The CHAIRMAN. Then, too, we have seen judges take over school districts and run them, or dictate to hospitals and other State institutions matters that should be left to the local authorities.

There is only so much power, and we have to decide whether it is going to all be brought to Washington, or be left to be exercised by the States and the local communities.

I get frustrated when I see Federal judges trying to take over responsibilities that belong to the States and local communities. How do you feel on that?

Mr. MENTZ. Well, I believe the function of the judges should be grievance resolution, and not problem resolution, and in particular I don't find it appropriate that the court should invade the prerogatives of an elected local board which has been duly elected after a vote of the people and charged with certain responsibilities as a board.

The CHAIRMAN. I think that covers the questions I have.

Thank you very much, Mr. Mentz. I hope you enjoy your tenure on the bench.

Mr. MENTZ. Thank you, Mr. Chairman. It has been a pleasure appearing before your committee.

The CHAIRMAN. You can retire now, and we will ask Mr. Moore to come up.

Judge Moore, raise your hand to be sworn. The testimony that you shall give in this hearing shall be the truth, the whole truth and nothing but the truth, so help you God.

Judge MOORE. I do.

The CHAIRMAN. Do you have members of your family here you would like to introduce?

Judge MOORE. I would like to introduce to the committee my beloved wife, Joan, who has made this trip with me.

The **Chairman**. We are glad to have you here, Mrs. Moore.

Judge **Moore**. Let the record also reflect the presence of my dear friend, Mrs. Armstrong.

The **Chairman**. We are delighted to have her, too. She is one of the finest women I know.

Without objection, your biography will be placed in the record, and that will save several questions.

TESTIMONY OF JUDGE JOHN P. MOORE, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF COLORADO

The **Chairman**. I have a few questions here I would like to propound to you.

Judge Moore, you have been a Bankruptcy Court judge for the District of Colorado since 1975, I believe.

Judge **Moore**. That's correct.

The **Chairman**. I guess you know our esteemed bankruptcy judge in South Carolina?

Judge **Moore**. I am afraid I don't have the privilege, Mr. Chairman.

The **Chairman**. Judge Davis. This is a trial court of special jurisdiction, and in cases arising out of the Bankruptcy Court, title II. I have confidence that you are very knowledgeable of the laws pertaining to bankruptcy and related matters. I wonder if you foresee any difficulty in the transition from a court of limited jurisdiction to the Federal district court.

Judge **Moore**. Mr. Chairman, obviously there is a lot of subject matter that I am going to have to learn and some of which I am going to have to relearn, but I think essentially the role of the trial judge in the Bankruptcy Court is comparable to that of the trial judge in the district court. I don't foresee any difficulty in that regard.

The **Chairman**. Judge, do you believe it would be helpful to you as a U.S. district court judge to have a Sentencing Commission to establish uniformity in sentencing? We have been working on that now, because in some cases a judge might give 2 years for an offense, and another judge might give 20 years. We do feel it would be helpful for the Sentencing Commission to have some uniformity, and then if the judge wanted to go above or below that he would have to have a good reason for doing it.

Judge **Moore**. Mr. Chairman, first of all I share your concern with the problem of sentencing. I think there is nothing more disenchanting to the public as a whole than to find disparity in the sentencing of individuals who are guilty of the same offense.

It is my personal experience that the function of the court should be exercised by the judge, who has the last decision to make. It would certainly be helpful, and I think even practical, to have some sort of a frame of reference for the judge to consider. But I think in the last analysis it must be the judge who alone makes the choice of how to deal with the individual in view of the crime of which he is convicted.

The **Chairman**. Judge, do you feel that a district court judge should assume direct control over complex issues in cases in order to avoid delays and effectively manage such cases?

Judge MOORE. Mr. Chairman, it has been my experience already, in the U.S. Bankruptcy Court, that the great perplexity of litigants is the question of why their cases can't be heard properly. The multitude of cases and issues submitted do cause delays, and I think it is the function of the judge to take an active role in the management of the docket and the management of individual cases so as to minimize the delay that keeps people from a prompt litigation of their issues.

The CHAIRMAN. In response to a portion of the committee's questionnaire pertaining to judicial activism, you informed the committee that, and I quote:

> The judge must be free to criticize and even suggest, but a judge must take care not to go beyond adjudication into the realm of legislation.

Now, judge, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was a type that ought to be made by a judge as opposed to an elected legislative body?

Judge MOORE. It is sometimes, I think, difficult to draw a fine line, but as I have indicated in my responses, my experience in State government and my experience on the court thus far have taught me the great importance of preservation of the division of powers amongst the branches of government. I think if one could draw a definition, it would be that matters which are issues of broad policy are generally those which belong in the legislative branch, and the decision of issues of fact that are presented to the court by the litigants is the function of the judge.

The judge is not a problem solver. The judge is a resolver of contentions.

The CHAIRMAN. In your opinion, should a judge take over school districts and other activities of a State?

Judge MOORE. It is my feeling that it is the function of the judge to tell the legislative or the executive when either has transgressed the Constitution. It is my feeling, then, that it is the responsibility of the other branches of the government to meet the need seen by the judge. I don't think, however, if either branch of government abdicates their responsibility, the judge can sit by without in some way violating the Constitution if the judge refuses to take a role.

But it is my personal feeling, and it is a strongly felt opinion, that that ought to be the last resort, not the first.

The CHAIRMAN. Don't you think it is the responsibility of the State to look after its institutions and not a Federal judge?

Judge MOORE. Indeed I do, Mr. Chairman, without doubt.

The CHAIRMAN. Don't you feel it is the responsibility of the Congress to make appropriations for Federal prisons and not a Federal judge to exercise his authority in that field?

Judge MOORE. Without doubt.

The CHAIRMAN. Judge, I think those are all the questions we have here. Thank you very much, and I hope you enjoy your service on the bench.

Judge MOORE. Thank you.

The CHAIRMAN. Mr. Jackson, if you will, come around now. Do you have any family or friends here you would like to introduce?

Mr. **Jackson**. I do not, Mr. Chairman. They are out earning a living today.

The **Chairman**. The evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. **Jackson**. I do.

TESTIMONY OF THOMAS P. JACKSON, NOMINEE, U.S. DISTRICT JUDGE, THE DISTRICT OF COLUMBIA

The **Chairman**. Mr. Jackson, since 1964, I believe you have been involved in the practice of law, specializing in general civil litigation. Do you feel that your relative lack of criminal trial experience will in any way hinder you in the performance of your duties as a Federal judge?

Mr. **Jackson**. I do not, Mr. Chairman. I did a fair amount of criminal work back before the creation of the Public Defender's Office. I will have to do a fair amount of studying to catch up on what has transpired since I no longer take appointed cases, but I am of the opinion that a good trial lawyer ought to be able to try anything.

The **Chairman**. Mr. Jackson, there has been a steady increase over the last two decades in the workload of the Federal courts, and all concerned seem to agree that the trend will probably continue.

Do you have any recommendations that might tend to stabilize or decrease this workload?

Mr. **Jackson**. Mr. Chairman, I know that the Congress has before it a number of bills designed to perhaps limit the jurisdiction of the Federal courts. Ultimately, however, I think that the solution is to appoint judges who are willing to work hard and who know how to move the docket.

The **Chairman**. You are willing to work long hours and do that, aren't you?

Mr. **Jackson**. Yes, sir, I am. I am looking forward to the opportunity.

The **Chairman**. I should have asked the other two judges that.

Mr. Jackson, would you explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern?

Mr. **Jackson**. Mr. Chairman, it is my intention to recuse myself automatically on any matter involving a former client of mine or in any matter involving my law firm. To the extent that there is any other extrajudicial contact between me and any litigant appearing before me, I will make a full disclosure of that to the parties and will recuse myself from that matter should I be requested to do so.

The **Chairman**. Mr. Jackson, in response to a committee question concerning criticism of judicial activism, you say that the primary function of a legal system is to maintain social order, usually accompanying the status quo. Justice in individual cases cannot be accomplished unless this can be done in the context of an ordered society in which a just result will be carried out while the social order remains fundamentally intact.

Would you elaborate on this statement, and specifically your interpretation of the primary function of the legal system?

Mr. **Jackson**. Well, Senator, I do believe that the function of a legal system in a civilized society is to maintain order first and foremost, and order usually lies with the status quo.

I meant that phrase perhaps in a somewhat cumbersome way, to express my belief in the rule with respect to the burden of proof. For example, I would require an exceptionally high order of proof before I would think I would be justified as a judge to intrude upon the operation of a school system or a prison system or any other activity committed by our Constitution to another branch of Government.

The **Chairman**. So you are a firm believer in the judge staying within his jurisdiction as provided in the Constitution, that is, to interpret the law?

Mr. **Jackson**. Most assuredly.

The **Chairman**. Is there anything else you wish to say?

Mr. **Jackson**. I don't think so, Senator, and I appreciate the opportunity to appear before you.

The **Chairman**. We are glad to have you with us, and we hope you enjoy your tenure on the bench.

Mr. **Jackson**. Thank you.

The **Chairman**. Without objection, we will ask that Mr. Jackson's biography be put in the record.

I believe those are all the hearings we have this afternoon.

If there is nothing else, the committee stands adjourned.

[Whereupon, at 3:03 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

Henry A. Mentz, Jr.

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF LOUISIANA

Birth: November 10, 1920, New Orleans, La.

Legal residence: Louisiana.

Marital status: Married to Ann Lamantia Mentz, 5 children.

Education: 1937-41—Tulane University, B.A. degree; 1941-43—Louisiana State University Law School, LL.B degree.

Bar: 1943—Louisiana.

Military service: 1943-46—U.S. Army.

Experience: 1943—Attorney, Monroe & Lamann, New Orleans, La.; 1946-47—Associate, Columbus & Horace Reid, Hammond, La.; 1947-48—Staff attorney, Shell Oil Company; 1948—Assistant to Executive Counsel to Governor of Louisiana; 1948-55—Private practice, Hammond; 1955-74—Mentz & Ford, Hammond; 1975-81—Mentz & Cashe, Hammond; 1981 to present—Mentz & Gorrell, Hammond.

John P. Moore

U.S. DISTRICT JUDGE, DISTRICT OF COLORADO

Birth: October 14, 1934, Denver, Colo.

Legal residence: Colorado.

Marital status: Married to Genevieve West Moore, 3 children.

Education: 1952-54—Stanford University, no degree; 1954-56—University of Denver, B.A. degree; 1956-59—University of Denver, LL.B. degree.

Bar: 1959—Colorado.

Experience: 1959 62—Associate, Carbone & Walsmith, Denver, Colo.; 1962-75—State of Colorado Law Department; 1975 to present—U.S. bankruptcy judge, District of Colorado.

THOMAS PENFIELD JACKSON

U.S. DISTRICT JUDGE, DISTRICT OF COLUMBIA

Birth: January 10, 1937, Washington, D.C.

Legal residence: Washington, D.C.

Marital status: Married to Mary C. Gardiner, two children.

Education: 1954-58 Dartmouth College, A.B. degree; 1961-64—Harvard Law School, LL.B. delgree;

Bar: 1965—District of Columbia.

Military service: 1958-61—U.S. Navy, honorable discharge.

Experience: 1964 to present—Jackson, Campbell & Parkinson (formerly Jackson, Gary & Laskey), associate 1964-68, partner 1968 to present.

CONFIRMATION HEARING ON JAIME PIERAS, JR.

WEDNESDAY, JUNE 23, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 2:11 p.m. in room 2228 of the Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Duke Short, chief investigator; Bill Christensen and Allan Spence, investigators; and Pamela Swanner, clerk.

NOMINATION OF JAIME PIERAS, JR.

The **CHAIRMAN**. The committee will come to order. Today we are holding a hearing on the nomination of Jaime Pieras, Jr., of Puerto Rico, to be U.S. district judge for the District of Puerto Rico.

Mr. Pieras, you can come around and have a seat, and I believe you are going to be presented by Congressman Baltasar Corrada.

Now, without objection, we will place your biography in the record, and that will save asking a lot of questions.

If you will stand up and be sworn.

[The witness stands and raises right hand.]

Do you swear that the evidence you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **PIERAS**. I do.

The **CHAIRMAN**. Mr. Congressman, we are glad to have you with us, and we will be pleased to hear from you. I want to congratulate the judge-appointee for having such an able Congressman here to endorse you.

STATEMENT OF BALTASAR CORRADA, RESIDENT COMMISSIONER, COMMONWEALTH OF PUERTO RICO

Mr. **CORRADA**. Thank you, Mr. Chairman and members of the Senate Committee on the Judiciary. My name is Baltasar Corrada, Resident Commissioner from Puerto Rico, and, as such, Puerto Rico's sole elected representative in Congress. I would like to very briefly set forth some of the reasons why I am appearing here today to present to you and to support the nomination of Jaime Pieras to be a U.S. district court judge for the District of Puerto Rico. I have known Mr. Pieras for approximately 20 years in a personal and professional capacity.

Mr. Pieras is a very competent lawyer with substantial trial experience. After receiving his law degree from the prestigious Georgetown University Law School in 1948, he joined the Puerto Rican legal community in which he has distinguished himself by his outstanding services. From 1960 to 1968 he was a law partner of Hon. Angel M. Martin, former associate justice of the Supreme Court of Puerto Rico, who recently retired from office after 11 notable years of distinguished service.

In 1969 Mr. Pieras associated as a law partner with the Honorable Juan Torruella, who currently holds the position of U.S. district judge for the District of Puerto Rico in a very noteworthy and competent fashion.

The fact that Mr. Pieras in his law practice has been a partner of two of our most distinguished judges before they were appointed to the bench is a clear indication of the high esteem his peers in the legal community in Puerto Rico have for him, both as an individual as well as a professional.

His vast experience, good moral character, and considerable dedication to the service of justice fully qualify Mr. Pieras for this position which carries such great responsibilities.

It is a pleasure for me to appear here today to endorse Mr. Pieras's nomination, and I commend President Reagan for selecting this outstanding Puerto Rican to the Federal bench.

Thank you, Mr. Chairman.

The CHAIRMAN. Congressman Corrada, we are pleased to have you to make such a glowing endorsement here of the nominee, and we will now be pleased to hear from the nominee, if he has any statement to make. Before doing that, do you have any family here that you would like to present?

Mr. PIERAS. Yes, sir. I would like to introduce to the Senator my wife, Mrs. Elsie Pieras, and my son, Jaime.

The CHAIRMAN. We are glad to have you both with us.

Mr. Rafael Capo, who is with the Vice President, is here today. And we are very pleased to have him.

We have statements here from Senator East of North Carolina and Senator Dole of Kansas, endorsing the nominee, and, without objection, they will be placed in the record.

[The prepared statements of Senators Dole and East follow:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, on occasion my duties in the Senator allow me the opportunity to offer advice and consent concerning a judicial nomination based on my personal knowledge and experience. Today is such an occasion.

I am pleased—and privileged—to support the nomination of Jaime Pieras, Jr. to be a United States District Judge for the District of Puerto Rico. I believe Jaime's nomination contributes to the strengthening and improvement of the quality of our judicial system.

Jaime and I became acquainted through our work with the Republican National Committee during the mid-1970's. As we became close friends, I came to value his loyalty and sincerity. He is a good family man with two children and he understands the importance of the family and traditional values in our changing society. But Jaime has much more to recommend him than the warm words of an old friend.

Since receiving his law degree from Georgetown University in 1948, Jaime has distinguished himself as an able and articulate advocate. He has earned not only the respect of his colleagues in Puerto Rico, but is esteemed by all who have worked with him. His knowledge of the law, the fineness of his analytical reasoning, and his innate understanding of human nature will undoubtedly make him a valuable addition to the Federal bench. I congratulate Jaime on his nomination and wish him continued success.

PREPARED STATEMENT OF SENATOR ROBERT DOLE

Mr. Chairman, thank you for this opportunity to include this statement in the record. While I am sorry that I am unable to attend this hearing today, I would like to take a few moments to speak on behalf of Mr. Jaime Pieras, who appears before this distinguished committee as a candidate for nomination to the U.S. District Court for the District of Puerto Rico.

The members of this committee have before them a copy of Mr. Pieras' biography so I will not waste time recounting his professional background, except to note his broad experience in the private practice of law.

It is a pleasure to commend his qualifications to the committee based on my personal working relationship with him. My acquaintance with Mr. Pieras began over 10 years ago when we served together on the Republican National Committee. When I was chairman, I gained an intimate knowledge of his industriousness, his professionalism, and his dedication and adherence to the highest ethical standards of the profession.

I wholeheartedly recommend Mr. Pieras to the committee and trust that he will receive favorable consideration.

Thank you.

The CHAIRMAN. Do you have any statement you would like to make before I propound a few questions?

Mr. PIERAS. Sir, I certainly would like to make a statement thanking the committee for the way they have handled this nomination. It has been brought before this hearing immediately after they received the papers, and I certainly thank the committee for this special privilege.

TESTIMONY OF JAIME PIERAS, JR., NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF PUERTO RICO

The CHAIRMAN. Mr. Pieras, would you please describe the arrangements that you have made to dissolve your law practice?

Mr. PIERAS. Since I don't have any partners any more, I am sole owner and have a practice. The attorneys in my office are under a salary. So, therefore, what I am doing is selling the assets of the office and advising clients to obtain other counsel.

The cases which are pending in court, I am obtaining other counsel to handle them, and I would make financial arrangements with them that would take into consideration the work I have already performed pertaining to every particular case.

The CHAIRMAN. I presume you would not sit as a judge in any case of a former client, where there is any interest involved of any kind.

Mr. SHORT. You would recuse yourself if a former client should come before you in your official capacity where there might be some personal interest.

Mr. PIERAS. Well, I certainly will not handle that case, sir.

The CHAIRMAN. A judge has to be very careful and not be criticized, and then, too, it would be improper in anything you had an interest in to hear the case.

Mr. Pieras, you have specialized in the practice of labor law. Do you feel that your relative lack of criminal trial experience will in any way hinder the performance of your duties as a Federal judge?

Mr. **Pieras**. Senator, although I have never practiced criminal law intensively, I have handled several cases appointed by the court some years back, but nevertheless I do accept the necessity and obligation to refresh that particular field. So I will do that, and I am sure that I will learn enough to impart justice adequately.

The **Chairman**. In your practice did you chiefly represent management or chiefly labor, or did you take cases on both sides?

Mr. **Pieras**. I only represented management.

The **Chairman**. Only management. Do you feel there is any reason why you can't be fair to both sides?

Mr. **Pieras**. I will be fair to both sides, because I will apply the law as the law is written, and that is my duty and I will discharge it.

The **Chairman**. Mr. Pieras, I consider judicial temperament to be a prerequisite for a Federal judge. Will you please give me your thoughts on this subject?

Mr. **Pieras**. Well, to me, that is very interrelated to equal justice under the law. That means that I would not look to whether I know any of the parties before me, or what is my philosophical thinking as to the questions presented to me. Through the years, while I have practiced law, it has been very important to me that the judge was impartial. I did not want him to be my friend or my enemy; I just wanted him to be impartial.

And that is just what I am going to do.

The **Chairman**. Mr. Pieras, in response to a committee question concerning the criticism of judicial activism, I believe you stated: "The jurisdiction of the court should be strictly construed. This concept should also extend to the scope of the orders of the court in and pursuant to providing a remedy."

Now, would you give the committee an example of your interpretation of this statement as it relates to court jurisdiction?

Mr. **Pieras**. Yes, sir. For instance, when we are faced now with a problem which is very common, of inadequate facilities for prisoners, and the matter comes before a Federal judge, I believe that the judge should order the publicly elected officer who has the duty, and who has been elected for that purpose, to comply with the law rather than the judge taking over the operations of a judicial center, jail, or whatever, through a trustee or directly.

That is what I mean by that, sir.

The **Chairman**. I am a great believer in the Constitution, and that the three branches of Government should stay in their own spheres. The Congress legislates, it makes the law; the President and the executive departments enforce the law; the courts interpret the law.

Do you feel that each should stay in its own sphere and not inject itself into other facets in which it has no constitutional jurisdiction?

Mr. **Pieras**. Senator, I believe that the fact that we have respected throughout practically two centuries the separation of powers is why this republic is still great. I certainly believe in that, sir.

The **Chairman**. Now, the States formed the Union when they wrote the Constitution, the States had all the powers before the Union was formed, and they delegated to the Union in the Constitution certain powers, and they have delegated other powers since the adoption of the Constitution. But, other than that, the States still have all the powers.

Do you believe that the States should run their own affairs and the Federal Government should not inject itself into local and State affairs and try to run schools and hospitals and other institutions of the State, or do you feel that is a State responsibility?

Mr. PIERAS. I feel that is a State responsibility, Senator.

The CHAIRMAN. What are the standards you will use in deciding that your court might have a continuing adminstrative responsibility to oversee the implementation of one of its orders?

Mr. PIERAS. Well, I believe that a court or a judge is not appointed or created for the purpose of continuously running the affairs of third parties, and I believe that the jurisdiction of the court should be short and up to judgment, and a little bit further, if necessary–but not to be extended.

The CHAIRMAN. Thank you very much. I want to say that a Federal judge is a very powerful man, and I have always felt that the more power a man has, the more humble he ought to be. Some people flaunt their power. I have seen judges yell at lawyers and witnesses and people in the court, jurors, and unnecessarily bring about embarrassment. I was just wondering how you would feel as a presiding judge about the people you deal with. Would you feel that you want to exercise your power to the fullest or use the least amount of power possible to run your court?

Mr. PIERAS. I certainly will always avoid overexercising that power. I don't think it's necessary. Everybody is conscious of the power of a judge, and if you impart justice properly, everybody is going to respect you without the judge having to be excessive in his demands.

The CHAIRMAN. And you would favor, I presume, giving equal justice to all people regardless of race or creed or color or sex or religion?

Mr. PIERAS. I will be dedicated to that, Senator.

The CHAIRMAN. I don't think I have any more questions. I hope you enjoy your service on the bench, and sometime in Puerto Rico we will look forward to seeing you.

Mr. PIERAS. Thank you, sir.

The CHAIRMAN. I believe that is all we have before the committee this afternoon, so we stand adjourned.

[The committee adjourned at 2:25 p.m.]

BIOGRAPHY

JAIME PIERAS, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF PUERTO RICO

Birth: May 19, 1924, San Juan, P.R.

Legal residence: Puerto Rico.

Marital status: Married to Elsie Castaner Bermudes, two children.

Education: 1942–45—Catholic University of America, B.A. degree; 1945–48—Georgetown University, J.D. degree.

Bar: 1949—Puerto Rico.

Military service: 1946–47—U.S. Army.

Experience: 1949–53—Attorney, Luis E. Dubon law firm; 1954—Attorney, tourism bureau of Puerto Rico; 1954–59—Attorney, Charles Hartzell law firm; 1959–60—Private practice; 1960-68—Partner, Pieras & Martin; 1969-75—Partner, Pieras & Torruella; 1975-77—Partner, Pieras & Esteves; 1977-79—Partner, Pieras & De La Matta; 1979 to present—Law firm Jaime Pieras, Jr.

CONFIRMATION HEARING ON:

PATRICK E. HIGGINBOTHAM, E. GRADY JOLLY, AND RICHARD A. GADBOIS, JR.

WEDNESDAY, JULY 14, 1982

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2 p.m., in room 2228, Dirksen Senate Office Building, Hon. Charles E. Grassley (acting chairman of the committee) presiding.

Staff present: Vinton DeVane Lide, chief counsel; Duke Short, chief investigator; Allan Spence, investigator; and Pamela Swanner, investigative clerk.

NOMINATION OF PATRICK E. HIGGINBOTHAM, E. GRADY JOLLY, AND RICHARD A. GADBOIS, JR.

Senator **Grassley**. I call the Committee on the Judiciary to order for the purpose of holding a hearing on the nomination of Judge Patrick E. Higginbotham, of Texas, to be U.S. circuit judge for the Fifth Circuit Court of Appeals, and for Mr. E. Grady Jolly, of Mississippi, to be U.S. circuit judge for the Fifth Circuit Court of Appeals, and for Judge Richard A. Gadbois, of California, to be U.S. district judge for the Central District of California.

Our first witness is Mr. E. Grady Jolly, of Mississippi. He has with him in support of his nomination the junior and senior Senators from Mississippi. I call on the Senators if you would like to speak in whatever order that you would like to speak in support of the nomination.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator **Cochran**. Mr. Chairman, I cannot remember any event during my almost 10 years of service in the Congress that has given me more pleasure than being able to introduce to this committee Grady Jolly and to recommend his confirmation as a member of the Fifth Circuit Court of Appeals.

Not only is he a close personal friend of mine, but he is one of the finest and most competent lawyers in the State of Mississippi. Grady Jolly is eminently qualified for this very important position. He is a graduate of the University of Mississippi, where he earned both his undergraduate and law degree. His academic record was outstanding. He ranked second in his law school graduating class.

His experience as an attorney includes both public service and private practice, civil and criminal cases in Federal and State courts. His career includes service as a trial attorney with the National Labor Relations Board for 2 years, as an assistant U.S. attorney in the Northern District of Mississippi for 3 years, and as a trial attorney for the Tax Division of the Department of Justice for 2 years. Since 1969 Mr. Jolly has been in the private practice of law in Jackson, Miss., specializing in employment relations law. He is a senior partner in a law firm that enjoys a very successful statewide practice.

In addition, the nominee has been very active in community, charitable, and cultural organizations.

Mr. Chairman, his exemplary performance as an attorney and as a citizen has demonstrated that he has a keen intellect and a willingness to work hard and effectively in any job he undertakes. Grady Jolly has a solid reputation among his fellow members of the bar, his clients, and the citizens of Mississippi.

I recommend him to you in the most sincere way I can as a person who will be one of the finest judges who has ever served on the Federal bench.

Senator GRASSLEY. Thank you, Senator Cochran. Senator Stennis, would you like to proceed?

STATEMENT OF HON. JOHN C. STENNIS, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator STENNIS. Mr. Chairman, I did not prepare a memorandum on Mr. Jolly's background because I knew your factual data would be supplied from other sources. I know a great deal about Mr. Jolly because since he was a very young man I have known him, his family before him, his father, and his uncles. He has the qualifications of character, honor, preparation, and experience will cause him to make a very successful and outstanding jurist. He particularly has the honor and principles that makes him very sincere in getting to the bottom of the complex matters which he will be called on to decide or help to decide.

I am proud of him as a Mississippian and am proud of his fine record. I trust him. I look forward to a great career for him in this highly important post.

Senator GRASSLEY. Thank you, Senator Stennis. Mr. Grady Jolly, we will proceed with your nomination just as soon as we hear from Senator Hayakawa, who just came in, in support of a nominee from his State. So, I would like to call Mr. Gadbois and Senator Hayakawa at this point to come to the table for a statement from Senator Hayakawa. Senator Hayakawa, I would appreciate it very much if you would proceed as you desire in support of the nomination of Judge Gadbois.

STATEMENT OF HON. S. I. (SAM) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Thank you, Mr. Chairman. I am very happy to have this opportunity to introduce the Honorable Richard A. Gadbois, Jr., the President's nominee for U.S. district judge for the central district of California. Judge Gadbois received high marks from my judicial selection committee for his outstanding judicial experience and academic attainment.

He received his master's degree from St. John's College in 1955. Following the receipt of his juris doctorate degree in 1958 from Loyola University in Los Angeles, he served as deputy attorney general in California's Department of Justice. In 1960, Judge Gadbois began an 11-year period of private and corporate practice that ended in 1971, when he became judge for the Los Angeles Municipal Court. In 1972, he was appointed by then-Governor Reagan to serve as the judge for the Superior Court of California for the county of Los Angeles, a position he still holds.

Judge Gadbois' academic and practical experience confirm that he is indeed the best choice to serve as judge for the Central District of California. Mr. Chairman, he has my heartiest endorsement.

Senator GRASSLEY. Thank you, Senator Hayakawa. I would ask you both to retire so I can call Senator Tower in support of Judge Higginbotham. I would ask Judge Higginbotham if he would come to the table as well. Senator Tower, would you please come now and proceed any way that you desire to at this point.

STATEMENT OF HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator TOWER. Thank you very much, Mr. Chairman. I appreciate the opportunity to appear on behalf of a very distinguished jurist who has been nominated to the Fifth Circuit Court of Appeals.

I will submit my full statement for the record and ask that it be included in its entirety in the record. I will simply summarize.

A few years ago, I had the privilege of presenting this young man to this committee as a nominee for Federal district judge for the Northern District of Texas. At the time, he was a young man who demonstrated great promise. He had the strongest support from the bar that I have ever seen for a district court nominee. He had already impressed quite a number of people with his abilities as a lawyer, his superior intellect, and his good instincts. At that time, he was the youngest member of the Federal bench. I believe that he was only 37 years old at that time.

Now I am very pleased to see that my judgment on him was vindicated by the fact that he has now been nominated by the President for the Fifth Circuit Court of Appeals. He has had a distinguished background before he assumed the Federal bench, which will be included in the record. I will not detain the committee by reading his lengthy qualifications and his background and his experience. I would simply say that this is a nomination that I am extremely proud to support, not just because he is an outstanding alumnus of the University of Texas at Arlington, not just because he is a Methodist, as I am, not just because he has lectured at the Southern Methodist University Law School, of which I am an alumnus. I was not a very distinguished alumnus, I might add, of the SMU Law School. I do not know of anyone I have ever presented to this committee who comes with better credentials and more substantive support for this position than Judge Higginbotham. I am pleased to present him to the committee.

I will entertain any questions you may want to ask him or me. Thank you, Mr. Chairman.

Senator **Grassley**. Senator Tower, if you want your entire statement put in the record, it will be.

Senator **Tower**. I ask consent, Mr. Chairman, that it be included in the record.

Senator **Grassley**. Without objection, so ordered.

[The prepared statement of Senator Tower follows:]

PREPARED STATEMENT OF SENATOR JOHN TOWER

Mr. Chairman, once before I have had the honor of introducing Patrick Higginbotham to the members of this distinguished committee. On that occasion, Judge Higginbotham was the nominee of the President of the United States for the office of Federal District Judge for the Northern District of Texas. At that time my fellow Texans and I were convinced that Judge Higginbotham would serve his country well, and that the administration of justice would be enhanced by his appointment. Today, little more than five years later, Judge Higginbotham has not only lived up to our expectations, he has exceeded them. He has proven himself to be a Judge of sterling quality, a legal scholar, and an individual of the highest personal integrity.

Therefore, Mr. Chairman, I consider it an honor to introduce Pat Higginbotham today as the nominee of the President for the office of Judge of the Circuit Court of Appeals, 5th Judicial Circuit.

Judge Higginbotham's legal qualifications speak for themselves. A graduate of the University of Texas with a Bachelor of Arts degree, he attended the University of Alabama School of Law. Graduating with an L.L.B. degree in 1961, he became a member of the Alabama Bar that same year. In 1962 he became a member of the State Bar of Texas. He is, in addition, a member of the U.S. Supreme Court Bar.

Judge Higginbotham is a member of the ABA, the Dallas Bar Association, the American Law Institute, the Southwest Legal Foundation, and the American Judicature Society. In addition, he is a member of the Farrah Law Society, Bench and Bar and Omicron Delta Kappa. Judge Higginbotham has been a lecturer in constitutional law and complex Federal litigation at the Southern Methodist University School of Law and has served as a faculty member for the American Institute of Banking, the Federal Judicial Center, Columbia University Trial Seminar, and the National Institute of Trial Advocacy.

From 1964 to 1976, Judge Higginbotham was engaged in the private practice of law in Dallas, Texas with the firm Coke and Coke. In 1976, he was nominated by then President Gerald Ford to serve as a Federal District Judge.

In addition to his professional activities, Judge Higginbotham serves as Chairman of the Board of the First United Methodist Church of Richardson, Texas, of which he is a member. In 1978, he was named an Outstanding Alumnus of the University of Texas at Arlington.

Mr. Chairman, at a time when the courts of our nation are undergoing the skeptical scrutiny of those who are concerned that the judicial branch has, in many instances, gone far past the mandate entrusted to it under our system of government, Judge Higginbotham will be a significant addition to the Circuit bench. His record of judicial restraint is clear and his adherence to the constitutional and political limitations on the judiciary is strict. His opinions on the bench reflect his ability to apply legal principles in a straight-forward, unstrained way. Finally, his command of both the English language and the language used by those in the legal profession permits him to write opinions which are concise and elucidate the problem well.

I recommend Patrick Higginbotham to this Committee without reservation to serve as a member of the Fifth Judicial Circuit Court of Appeals.

Senator **Grassley**. I know how busy you are, Senator Tower. If you desire to leave, everybody will understand.

Without objection, we will insert into the record a statement from Senator Bentsen.

[The prepared statement of Senator Bentsen follows:]

PREPARED STATEMENT OF SENATOR LLOYD BENTSEN

Mr. Chairman and members of the committee, I am pleased to have this opportunity to submit a statement for the record on the nomination of the Honorable Patrick Higginbotham to be a judge on the 5th circuit court of appeals.

It is always a pleasure to be able to comment on behalf of an individual who has proven his competence and professional ability. I have found and, I hope that this committee will agree, that Judge Higginbotham is an exceptionally well-qualified nominee and, if approved by this committee, would serve with distinction as a judge for the 5th circuit.

Judge Higginbotham brings to the Federal appellate system a wide range of experience, not only as a result of his having served as a Federal district judge for the northern district of Texas since 1976, but also as a result of his educational background, his military service and his years of litigation experience in the Federal system while in private practice. He attended Arlington State College, North Texas State University and the University of Texas. He received his BA and LLB degrees from the University of Alabama in 1961 after acquiring an impressive list of law school credentials. During his military career with the United States Air Force from 1961–64, he served on the Judge Advocate General's Corps.

While in private practice, he was active in civil litigation, primarily in the Federal system, in connection with prosecution and defense of securities fraud, civil rights and antitrust cases. I could go on and on reciting his qualifications for this important position. But I believe it would be repetitive. This committee thought enough of his qualifications to recommend his nomination favorably to the Senate back in 1975 and he assumed his duties as the Federal district judge for the northern district of Texas, Dallas division, on January 2, 1976.

The committee's own record speaks highly with respect to his qualifications and Judge Higginbotham's own record speaks for itself as to his judicial qualifications. Throughout his years on the Federal bench he has proven himself to be a thorough and intellectual judge. He keeps abreast of the latest developments in the law and has at all times maintained a judicial demeanor that serves as a model for judges at all levels of our judiciary.

Mr. Chairman, the members of this committee fully understand the importance of selecting proven, qualified individuals for Federal judgeships. You appreciate that in a Democratic society there can be no more important task than the administration of justice. I would like to commend this committee which has demonstrated its responsibility to insure that our judiciary represents the best and highest principles we stand for as a nation. Judge Higginbotham would continue to exemplify the committee's commitment in this respect. I believe he meets and exceeds the high standards for service established by this committee and I would urge the members of this committee to act favorably on his nomination.

Once again, I thank you for the opportunity to submit a statement for the record on Judge Higginbotham's nomination.

Senator GRASSLEY. I would now swear you in, Judge Higginbotham, if you would stand and raise your right hand.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge HIGGINBOTHAM. I so swear.

Senator GRASSLEY. Do you have any members of your family that you would like to introduce to us at this point?

Judge HIGGINBOTHAM. I do not, Senator.

Senator GRASSLEY. Any statement that you want printed in the record will be received and printed in the record. If you have an oral statement you would like to make now, we would receive that at this point.

Without objection, we will insert your biographical material into the record.

TESTIMONY OF PATRICK E. HIGGINBOTHAM, NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT COURT OF APPEALS

Judge HIGGINBOTHAM. I have no opening statement to make, Mr. Chairman, other than to express my appreciation to Senator Tower for the confidence he has shown in me both in this recommendation and his previous recommendation and in the confidence of the President in forwarding this nomination.

Senator GRASSLEY. I have some questions that I would like to ask you. Judge, in 1978 you were one of three Federal district judges appointed by the Chief Justice of the United States to a special committee to develop plans for preparing the Federal judiciary for enactment of the proposed new criminal code. Would you tell me what action this special committee took, what the results were, and your perception of the need for this new legislation?

Judge HIGGINBOTHAM. The original compass of the committee narrowed considerably after our appointment, when it became increasingly clear that the legislation was not imminent in its passage, at least not so imminent as we first had supposed. The compass was narrowed to a task of preparing model jury instructions using new techniques in an effort to communicate more effectively with jurors. With Judge Marshall from the Northern District of Illinois and Judge Tom Flannery from the district court here in Washington, we set about to prepare pattern jury instructions for the Federal judiciary. We used the services of a journalist, and we used the services of a person who has the discipline of a psycholinguistics specialist.

The result of that effort is memorialized in a book which is now being published and released by the Federal Judicial Center. It consists of pattern jury instructions.

Senator GRASSLEY. Do you foresee a need for enactment of the new criminal code?

Judge HIGGINBOTHAM. I think that anytime we have a large body of law that has remained in scattered parts throughout the code, and has been amended from time to time, recodification is a genuine concern. There are obviously many parts of the code that need substantive attention. I would not undertake to try to pass judgment on a piece of legislation that covers such a wide variety of subject matters other than to say that the task itself is one that is needed. That is, the legislative effort, I think, is a noble objective.

Senator GRASSLEY. Judge, you served on a committee to plan sentence instructions for district judges of the fifth circuit. You also wrote an article entitled "Observations on the Philosophy of Sentencing," which was published by the Texas Bar Journal. Judge, with this background do you feel that in your present capacity as a district court judge that it would have been helpful to you to have a sentencing commission to establish uniformity in sentencing?

Judge HIGGINBOTHAM. I recognize the proposal of a sentencing commission that has been put forward from time to time. I think again that particular effort addresses a genuine problem, namely disparity of sentencing. I think, however, you have to be very careful. One ought to be very careful as to whether or not sentencing guidelines will, in fact, achieve the desired objective, the desired objective being to try to mitigate disparity in sentencing. The task is difficult because one has to reflect upon and define what he wants to do and accomplish with disparity of sentencing. The reality is that we want simultaneously to avoid sentencing two similarly situated persons in a wholly disparate way and at the same time to not deprive a district judge of the discretion to tailor a particular sentence to fit a particular defendant. I am not convinced that the sentencing commission proposals would necessarily achieve those objectives, although I think that they move in the right direction. I think, instead, there are other ways that perhaps may move in a firmer way toward eliminating or reducing disparity of sentencing.

Senator GRASSLEY. My last question, Judge, refers to the fact in 1980 prisoner petitions comprised approximately 14 percent of all U.S. district court civil litigation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements calling for complete exhaustion of State remedies, time limitations on the filing of petitions, and eliminating magistrates' authority to hold evidentiary hearings.

Do you feel there is a need to alter the degree of access to Federal courts by State prisoners? That is the first part of my question. If the answer to that is yes, what recommendations in this area would you make?

Judge HIGGINBOTHAM. I think that the desired objective; namely, attempting to achieve finality in criminal process, is one that ought to be struck for. There is indeed a problem with regard to an absence of finality. On the one hand, we value the Great Writ. We value the procedural means of perhaps correcting an unjust result.

On the other hand, I think we have to be very careful that we do not in the process of allowing collateral review of an earlier criminal conviction, to allow a person, to time after time come back to the courts in an effort to overturn his conviction. Piecemeal presentation and repeated presentations to the Federal court denigrate the Great Writ. They desensitize judges to those cases where indeed there may be merit.

In sum, I think indeed the answer to the first part of the question is yes, that there is a problem, and it needs to be addressed.

The second part of your question, as to how that ought to be done, is a much more complex question. I do not want to get into specific details of that because there are a number of very particular statutory provisions under title 28 which reach to the problem. But let me say that in a general way that one of the problems that could be reached legislatively would be the problem of successive writs. Unfortunately, it is very difficult under current standards to prevent a personal lawfully convicted, whose conviction has been upheld by the highest court of the State and in fact whose conviction may very well have been sustained on the first attack by the Federal court, to keep coming back time after time.

It seems to me the Congress properly can address that subject. The prisoners must have access to the courts, but they cannot turn the courts or ought not be allowed to turn the courts upside down. They have to have their turn. At the same time, we have to recognize the historic values of finality in criminal sentencing.

Senator GRASSLEY. Thank you for your testimony. I have no further questions. I want to compliment you on being nominated. Besides the fine testimony of support that we have had from Senator Tower, we also have a statement here from Senator Bentsen, who is also supportive of your nomination. That, together with the record that you have made as a judge already, and now that you have made before this committee, assures me that you will be confirmed. We will try to process it as quickly as we can. Thank you very much.

Judge **HIGGINBOTHAM**. Thank you, Senator.

Senator **GRASSLEY**. I next call Grady Jolly and Senators Stennis and Cochran.

Could I ask you to stand, sir, and raise your right hand?

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **JOLLY**. I do.

Senator **GRASSLEY**. Do you have any members of your family or friends or any supporters besides the Senators that you would like to introduce?

Mr. **JOLLY**. Yes, sir, I do.

Senator **GRASSLEY**. Would you please do that now?

Mr. **JOLLY**. I would be happy to. I would like first to introduce my wife, Bettye Jolly. If she would stand up, I would appreciate it.

Senator **GRASSLEY**. Would you like to come forward and sit at the table, too?

Mrs. **JOLLY**. No, sir.

Senator **GRASSLEY**. Senator Stennis, please come up and sit at the table, too. Is that all of your family?

Mr. **JOLLY**. That is all of my family, but I do have some friends I would like to introduce.

Senator **GRASSLEY**. Well, you had better introduce them, too. You don't want them to get mad at you.

Mr. **JOLLY**. I would like to introduce a very close friend that perhaps the committee knows very well, Rose Cochran, the Senator's wife, who is an awfully dear and close friend; and the Senator's children, Clayton and Kate, are here. My friend, Roger Flynt, back here has come up from Jackson, Miss.; I would like for him to stand. And I have other friends here who are on Senator Cochran's staff and from other places here in Washington. I would like to express my appreciation for their having come.

Senator **GRASSLEY**. Now we would receive either oral or written statements from you. If you have a written statement, it will be incorporated in the record. If you want to make an oral statement, you can do that now. When you are done speaking, I have some questions I would like to ask you.

Without objection, we will insert into the record your biographical material.

TESTIMONY OF E. GRADY JOLLY, NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT COURT OF APPEALS

Mr. **JOLLY**. Thank you, Senator Grassley. I really do not have a statement to make other than to express my very deep and personal appreciation to Senator Cochran for the expression of confidence that he has shown in recommending me for this position.

I would like to express my deep appreciation to Senator Stennis for the support that he has shown in Senator Cochran's recommendation. And I would like to express to President Reagan my very deep appreciation for having nominated me.

I would like to say that I hope and pray and believe that I will never be any cause of disappointment to them, either in my conduct or my decisions as a judge on the court of appeals for the fifth circuit.

That is all I have to say at this time.

Senator **Grassley**. Mr. Jolly, my first question is this. Obviously, you have been practicing as an attorney for a long time. I believe since 1962. Now you have been nominated for the position of U.S. Circuit Judge for the Fifth Circuit. What do you feel will be the most rewarding aspect of serving in that capacity as a judge in the court of appeals?

Mr. **Jolly**. Senator Grassley, I would answer that question by saying that I have received a great deal of satisfaction from practicing law, and I am still very happy in that profession. I would expect to receive a lot of the same gratification and satisfaction as a judge as I have as a practicing lawyer.

In addition to that, I suppose that the appealing aspects of the judgeship on the U.S. Court of Appeals for the Fifth Circuit are the intellectual challenge and the opportunity to participate in the development of decisional law in the fifth circuit. These would be the greatest sources of reward to me in this new job.

Senator **Grassley**. The next question deals with class action cases. You informed the committee that you felt that class action provision of rule 23 of the Federal Rules of Civil Procedure had a central purpose of promoting of judicial economy by allowing the litigation of a large number of claims in a single proceeding. You also said at that time that you felt that this was certainly a reasonable approach. There, of course, have been many abuses in this area. I wondered if you would give the committee your views on ways to curb these abuses.

Mr. **Jolly**. Senator Grassley, I think that the best way to curb abuses in the employment of class actions by Federal district courts is to exercise tight judicial control. I believe if the courts very strictly and carefully apply the requirements of rule 23 as they are actually spelled out in the rule with respect to numerosity, typicality, and commonality of claims and adequacy of representation, we would see a great deal less criticism of the use of rule 23.

I might note that the U.S. Supreme Court has recently reversed the fifth circuit in this area in the case of *General Telephone Company of the Southwest* v. *Falcone*. In that case the court warned about overly broad class actions. I think that has been the danger, that has been the squrce of criticism. With the Supreme Court setting the standard as they have in this recent case, along with the firm application of the requirements of rule 23, I believe that the abuses that we have seen in the past are likely to be less than we will see in the future.

Senator **Grassley**. Mr. Jolly, would you tell the committee how you will resolve any potential conflicts of interest, including the procedure you will follow in determining these areas of concern?

Mr. **Jolly**. I, frankly, do not perceive any conflicts other than that which any lawyer would have in withdrawing from a firm. To resolve those potential conflicts, I would, of course, refrain from participating in the decision of cases involving any client that I presently have or have represented in the past. I would refrain from hearing any cases in which my former partners and associates were involved. That restriction upon my participation in cases of that kind would last for a number of years and then be judged on a case-by-case basis as to whether there was any actual conflict.

Senator **Grassley**. The number of years have not been determined yet. Is that correct?

Mr. **Jolly**. I have not worked out the final details in terms of my withdrawal with the law firm. However, the agreement will specifically provide for a term not less than 4 years for severing my relationship with the firm and my former partners.

Senator **Grassley**. Those are all the questions I have. I want to compliment you. I am particularly, as an individual member of the committee, impressed when anybody is nominated immediately from law practice to a circuit court of appeals. It speaks well of your background and your professionalism. With the support of the two Senators you have, I am sure you will do well. So, I will not repeat the statements that I made to Judge Higginbotham; but I think you could expect us to move very quickly on this. Once again, congratulations.

Mr. **Jolly**. Thank you very much, Senator Grassley.

Senator **Grassley**. I thank you and both of my colleagues.

Our next nominee is Judge Gadbois.

Would you raise your right hand?

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Gadbois**. I do.

Senator **Grassley**. Do you have members of your family that you would like to introduce?

Judge **Gadbois**. Yes, sir. My wife Jeanne is with me. Alongside her is my very dear friend and former law partner Ralph Erickson, who was a few years ago the Deputy Attorney General of the United States.

Senator **Grassley**. Welcome to the committee.

We would receive written or oral testimony from you at this time.

Without objection, we will insert into the record your biographical material.

TESTIMONY OF RICHARD A. GADBOIS, JR., NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA,

Judge **Gadbois**. Mr. Chairman, other than to have the record reflect my thanks to Senator Hayakawa and to the President, I will forgo a formal statement. Thank you, sir.

Senator **Grassley**. I will have to hurry on these questions because I have about 7 minutes until we have a vote on the floor.

You have served on the Superior Court of California for approximately 11 years. I am confident that you are very knowledgeable of State laws. Do you foresee any difficulty in the transition from a State court to the Federal district court?

Judge **Gadbois**. Well, it is not going to be devoid of any difficulty, but I have seen this coming for a while, Senator. I have been studying the Federal Rules of Procedure, both civil and criminal, and our own local rules and have been doing some reading in Moore's Manual. I think it will work out all right.

Senator **Grassley**. Judge, Senator Thurmond, several others and I recently introduced a violent crime and drug enforcement improvement act of 1982 which, among other things, calls for sentencing reform. The major features of this provision include for the first time setting forth the purpose of sentencing and changing the sentencing system to a determinant sentence with no parole and limited good-time credits. A seven-member sentencing commission would be responsible subject to review by Congress for promulgating sentencing guidelines for the courts to use in determining an appropriate sentence. The court would be required to explain the basis for any sentence outside the guidelines.

Judge, would you give me your thoughts on the need for sentencing reform and the provisions that I have outlined?

Judge **Gadbois**. Very quickly, it has been reported in the press that there are surveys that indicate a wide disparity in sentencing in the Federal district courts. That is not a desirable thing. Anything that you can do to change that is a salutary move.

We have recently in California determinant sentencing. My impression is that it is working pretty well. It provides a degree of certainty that criminal lawyers and criminal defendants never had before.

Senator **Grassley**. You say California has that?

Judge **Gadbois**. Yes, as of several years ago. It seems to be working quite well.

As far as the statement of reasons, I think it is important for a judge to give a thorough statement of reasons anytime he sentences someone to a period of significant incarceration. I would certainly approve that.

Senator **Grassley**. Another provision of this act that I previously referred to calls for amendments affecting insanity defense and mental competency. One feature closes a loophole in the current law by providing a Federal commitment procedure for a dangerous Federal defendant found not guilty by reason of insanity if no State will commit him. Another aspect of this title would replace the current Federal insanity defense with a narrower defense applicable only to those individuals who are so mentally ill that they could not form the mental state required for the crime.

Judge, once again, would you give me your views on the need for reform of the insanity defense?

Judge **Gadbois**. Without knowing the specific provisions and studying them, I think that is a good idea. Obviously, the defense is valid in some cases. In any event, if it prevails, there has to be some procedure for long-term incarceration of people who are criminally insane and who have committed violent acts. There is no question about that in my mind.

Senator GRASSLEY. Judge, those are all the questions I have. Once again, as I stated to the other two nominees, I think you are to be complimented for coming this far in your profession and probably going further and being a good judge. You are to be complimented. Your family and friends can legitimately be proud of you. You seem to have the proper support and credentials. I would, too, expect this committee to move very quickly so that you can enjoy your new capacity serving the people of our country. Thank you very much.

Judge GADBOIS. Thank you so much, sir.

Senator GRASSLEY. We are adjourned, subject to the call of the Chairman.

[Whereupon, at 2:35 p.m., the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

PATRICK E. HIGGINBOTHAM

NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT COURT OF APPEALS

Birth: December 16, 1938, Bessemer, Ala.

Legal residence: Texas.

Marital status: Married to Elizabeth O'Neal Higginbotham, 2 children.

Education: 1956-57—University of Alabama; 1957-58—Arlington State College; 1958—University of Texas; 1958-61—University of Alabama, B.A. degree (1960), LL.B. degree (1961).

Bar: 1961—Alabama.

Military service: 1961-64—U.S. Air Force, Judge Advocate General Corps.

Experience: 1964-75—Coke and Coke, Dallas, Tex.; 1975 to present—U.S. District Judge, Northern District of Texas, Dallas, Tex.

E. GRADY JOLLY

NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT COURT OF APPEALS

Birth: October 3, 1937, Meridian, Miss.

Legal residence: Mississippi.

Marital status: Married to Bettye Simmons Jolly.

Education: 1955-59—University of Mississippi, B.A. degree; 1960-62—University of Mississippi School of Law, LL.B. degree.

Bar: 1962—Mississippi.

Experience: 1962-64—Trial attorney, National Labor Relations Board, Winston-Salem, N.C.; 1964-67—Assistant U.S. Attorney, Northern District of Mississippi, Oxford, Miss.; 1967-69—Trial attorney, Tax Division, U.S. Department of Justice, Washington, D.C.; 1969 to present—Jolly, Miller & Milam (formerly known as Sullivan, Bishop, Jolly & Blunt), Jackson, Miss.

RICHARD A. GADBOIS, JR.

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: June 18, 1932, Omaha, Nebr.

Legal residence: California.

Marital status: Married to Jeanne E. Roach Gadbois, 5 children.

Education: 1950-55—St. John's College, A.B. degree; 1955-58—Loyola University School of Law, Los Angeles, Calif., J.D. degree.

Bar: 1959—California.

Experience: 1959-60—California Department of Justice; Deputy Attorney General; 1960-62—Associate, Foster, Gemmill & Farmer; 1962-68—Partner, Musick, Peeler & Garrett; 1968-71—Vice-president, general counsel and secretary, Denny's Inc.; 1972 to present—Superior Court of California, County of Los Angeles.

CONFIRMATION HEARING ON J. LAWRENCE IRVING

WEDNESDAY, JULY 21, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 2:20 p.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Duke Short, chief investigator; Allan Spence, investigator; and Pamela Swanner, investigative clerk.

NOMINATION OF J. LAWRENCE IRVING

The **CHAIRMAN**. The committee will come to order.

We have met today to hold a hearing on the nomination of Mr. J. Lawrence Irving of California, who has been appointed by the President to be a U.S. district judge for the Southern District of California.

Mr. Irving, if you will stand up and be sworn.

[Witness sworn.]

The **CHAIRMAN**. I have had the pleasure of meeting your family. We are pleased to have them here at your hearing.

Now, Senator Hayakawa recommended you, I believe, for this position, and he is here today and we will hear from him first because he may be busy and wish to be excused.

Senator Hayakawa, we are very pleased to have you here and you may proceed.

STATEMENT OF HON. S. I. (SAM) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **HAYAKAWA**. Thank you, Mr. Chairman.

I am indeed happy today to have the privilege of introducing Mr. J. Lawrence Irving, the President's nominee for the U.S. district judge for the Southern District of California. Actually, I had hoped to make this introduction in 1979 when I first recommended Mr. Irving for the position for which he has now been nominated, but that was under a previous administration. I am as convinced today as I was then of his outstanding qualifications and abilities.

Mr. J. Lawrence Irving's educational and professional experience are rooted in his native southern California. After graduating from the University of Southern California's Law School in 1963, he joined the San Diego law firm of Higgs, Fletcher & Mack to which he was later admitted as a partner.

In 1969, Mr. Irving left the firm to establish his own, Irving & Butz, where his practice has focused on civil litigation.

In addition to President Reagan, J. Lawrence Irving has received the praise of Judge Edward J. Schwartz, whose position he will fill; Chief U.S. District Judge Howard B. Turrentine; and the legal community of southern California. I share fully their confidence in his ability to serve the people of southern California and the Nation.

This is a great pleasure, Mr. Chairman, to introduce Mr. J. Lawrence Irving.

The CHAIRMAN. Thank you very much, Senator.

We are honored to have you before this committee, and with your high recommendation of Mr. Irving, I feel sure he will have no difficulty being confirmed.

Mr. Irving, we have a few questions here we would like to ask you. But just prior to doing that—Senator Hayakawa, please feel free to leave, or stay if you want to.

Without objection, we will place a biography of J. Lawrence Irving into the record.

Mr. Irving, I recently introduced the Violent Crimes and Drug Enforcement Improvement Act of 1982. This bill, among other things, calls for sentencing reform. The major features of this provision includes setting forth the purpose of sentencing and changing the sentencing system to a determinative sentence with no parole and limited good time credits. A seven-member sentencing commission would be responsible, subject to review by Congress, for promulgating sentencing guidelines for the courts to use in determining appropriate sentence. The courts would be required to explain the basis for any sentence outside the guidelines.

Mr. Irving, would you give me your thoughts on the need for sentencing reform and the provisions that I have outlined?

TESTIMONY OF J. LAWRENCE IRVING, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA

Mr. IRVING. Senator Thurmond, I think I can say without qualification I believe the system is in need of reform. I will in reverse order respond to the items that you raised.

First of all, with respect to determinate sentencing, they have had this in California under the State laws, as you know, for some time. It seems to me there has been a disparity in sentencing and there is a need to make sentences more consistent, where you have a person guilty or convicted of the same crime. I believe it has been working out well in California, determinate sentencing, and I certainly concur that this is a needed reform.

With respect to the guidelines, I think this would be extremely helpful to a judge, in obtaining guidelines to sentence again for consistency purposes, and the need to set forth the reasons for the sentence I think are also important and that should be done.

The CHAIRMAN. Mr. Irving, another provision of the Violent Crimes Act calls for amendments effecting insanity defense and mental competency. One feature closes a loophole in current law by providing a Federal commitment procedure for dangerous Federal defendant found not guilty by reason of insanity if no State will commit him.

Another aspect of this title would replace the current Federal insanity defense with a narrower defense applicable only to those individuals who were so mentally ill that they could not form the mental state required for the time.

Mr. Irving, would you give me your views on the need for reform of the insanity defense?

Mr. IRVING. Like the previous statement, Senator, I am also in agreement that there needs to be reform in this area. There are certainly circumstances, I believe, under which a person who commits a crime may be legally insane at the time the person does commit the crime. On the other hand, where a person is in fact convicted of a crime and found guilty by reason of insanity, there should be some provision by which that person could be incarcerated in some type of institution for a substantial period of time, a sentence of a stiffer type.

The CHAIRMAN. In other words, do you not feel that the individual either ought to serve the sentence for committing the crime or be committed to an institution for his custody in order to protect the public?

Mr. IRVING. Absolutely.

The CHAIRMAN. Mr. Irving, a subcommittee of the Judicial Conference of the United States is considering a proposal that would require judges to close criminal trials whenever they believe openness might prejudice a jury. These same proposals would allow judges to order the media not to report certain proceedings and to hold news organizations in contempt of court for violating such an order. Media organizations have argued that it violates Supreme Court rulings as well as the judicial policymaking procedures.

The Supreme Court did, in the Richmond newspapers' opinion, rule that the first amendment requires open trials except in extraordinary circumstances, although it did not identify those circumstances.

Mr. Irving, would you give me your views on the advisability of the proposed action?

Mr. IRVING. Well, I feel very strongly, Senator, that trials should be public, should be open to the public and should be—the press should be allowed to report these judicial proceedings. I am sure there are extraordinary circumstances under which the access to the public should be barred. Something that comes immediately to mind might be matters involving juveniles. But I think there should be very definite legislative limitations upon the court's power to bar the public and the press from public trials.

The CHAIRMAN. Mr. Irving, Chief Justice Burger in his 1981 year-end report on the judiciary wrote:

> I hope Congress will promptly consider limiting Federal collateral review of State Court convictions to claims of manifest miscarriages of justice. The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases.

A major portion of the problem addressed by the chief justice is the increase in the writ of habeas corpus by State prisoners seeking to overturn State court convictions in Federal court. In fact, in 1980, prisoner petitions comprised approximately 14 percent of all U.S. district courts' civil litigation filing.

Mr. Irving, do you feel there is a need to alter the degree of access to the Federal courts by State prisoners and, if so, what recommendations in this area would you make?

Mr. IRVING. Well, about the best I can do in response to that is make—give you a kind of general answer, and that is that I think I share the view of most citizens that there seems there is no finality to these convictions, that when a person is convicted in State court, it seems to go on and on and on. Something has to be done legislatively, it seems to me, to insure finality, to make sure that we—a person is given a fair trial, that when that judgment finally comes in, the appropriate appeals are exhausted, the case terminates. I think the manner in which that is done is up to the legislature. I would have to defer to their wisdom in the specific sense as to how that is to be done.

Certainly, on the other hand, there is a need for citizens to have access to the Federal courts. So it is just a balancing and how that balancing is accomplished in a legislative matter, it seems to me.

The CHAIRMAN. Mr. Irving, you informed the committee that you viewed the function of the U.S. district court judge as "interpreting and applying the laws of the legislative branch of government and following the precedence direction and orders of the higher courts."

I wonder, however, what you feel is the proper application of very decisive and constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. IRVING. The Constitution prevails.

The CHAIRMAN. How is that?

Mr. IRVING. I would say that the Constitution, without question, would take precedence over stare decisis.

The CHAIRMAN. Mr. Irving, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Mr. IRVING. I think, Senator Thurmond, to me it means the tendency of some judges to legislate, to go far beyond what I view the role of a judge to be, and that is one of interpretation of laws and rather than legislating, and I think that that is not the function of a judge. That is the function of a legislator.

The CHAIRMAN. We have had too much judicial activism, in my opinion, for a number of years. The three branches of Government, of course—the legislature makes the laws, the executive administers the laws, and the judicial interprets the laws.

Do you not feel that each should stay within their own sphere of authority as outlined in the Constitution?

Mr. IRVING. Absolutely.

The CHAIRMAN. I do not think we have any other questions. I hope you enjoy your service on the bench and we wish you well. The hearing is adjourned.

[Whereupon, at 2:30 p.m., the committee adjourned.]

BIOGRAPHY

J. LAWRENCE IRVING

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA

Birth: February 16, 1935, San Diego, Calif.

Legal residence: California.

Marital status: Married to Evelyn Johnson Irving, 2 children.

Education: 1952-53—San Diego Junior College; 1952-54, 1957-59—University of Southern California, B.S. degree; 1959-63—University of Southern California School of Law, LL.B. degree.

Bar: 1963—California.

Military service: 1954-56—U.S. Army, honorable discharge.

Experience: 1963-69—Higgs, Fletcher & Mack, San Diego, Calif. (Associate 1963-1966), (partner 1966-1969); 1969-77—Jones & Irving (later known as Jones, Tellam, Irving & Estes); 1975-80—Law offices of J. Lawrence Irving, Inc.; 1978 to present—Irving & Butz, Inc., partner.

CONFIRMATION HEARING ON:

HARRY W. WELLFORD, ANTONIN SCALIA, MICHAEL M. MIHM, AND BRUCE M. SELYA

WEDNESDAY, AUGUST 4, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, in room 2228, Dirksen Senate Office Building, at 2:10 p.m. Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Denton and Heflin.

Staff present: Duke Short, chief investigator; Bill Christensen and Allan Spence, investigators; and Pamela Swanner, investigative clerk.

NOMINATION OF HARRY W. WELLFORD

The **CHAIRMAN**. The committee will come to order.

We have a number of nominations to consider today. First is Judge Harry W. Wellford, of Tennessee, to be U.S. circuit judge for the Sixth Circuit Court of Appeals.

Is Judge Wellford in the hearing room? If you will, come around and have a seat. Our majority leader, I believe, is here with you, and we will be glad to hear from him.

Will you stand and be sworn. Do you solemnly swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **WELLFORD**. I do swear.

The **CHAIRMAN**. We will be pleased to hear from the majority leader.

STATEMENT OF HON. HOWARD H. BAKER, JR., A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator **BAKER**. Thank you, Mr. Chairman. I feel like I have spent most of my day with you, having just come from the floor of the Senate where you had a magnificent victory in the vote to secure a balanced budget.

The **CHAIRMAN**. With your help.

Senator **BAKER**. It was your effort and persistence. I would say I never saw a man who showed more stamina and physical resources than you did in working that amendment through, and you and Senator Hatch are to be congratulated, along with Senator Domenici.

The **Chairman**. Thank you for your kind words.

Senator **Baker**. I was pleased to have Judge Wellford and his family there to watch that historic moment.

The **Chairman**. Would you like to introduce your family?

Judge **Wellford**. I would introduce my wife, Katherine Wellford, and my son, Butler Wellford, who is a lawyer from Memphis.

The **Chairman**. We are glad to have you with us.

Senator **Baker**. Mr. Chairman, I will not take much time, but I would not pass up this opportunity to appear and introduce Judge Harry Wellford from Memphis.

I am pleased to join with my colleague, Senator Sasser, in bringing to this committee a nominee, a native Tennessean who has a distinguished record as a trial lawyer and more recently as a U.S. district judge in Memphis.

Being a judge these days is always a difficult job, and his career is filled with controversy over matters and issues. It is a mark of the greatness of the judicial person that their temperament, their equanimity, and their evenhanded treatment of these delicate issues is widely proclaimed in his community and by the bench and bar, as indeed has been the case with Judge Wellford.

It is my privilege, therefore, to nominate Judge Wellford, to recommend to the President the nomination of Judge Wellford to the bench of the Sixth Circuit Court of Appeals.

I used to practice law myself. I am fond of saying, and most lawyers will forgive me for it, will forgive me for saying I was once a lawyer, also, but I recovered from it, and when I did practice, the appellate work I did in the district courts was always on appeal to the Sixth Circuit Court of Appeals, where I won some and lost some, but it is a distinguished court and has had many great issues before it, and has handled them in a distinguished way.

Judge Wellford will bring credit to that court. He will bring credit to this committee, to the Senate, and to the President of the United States in his further service to his country on that bench.

Mr. Chairman, may I take an additional moment to speak of another nominee who is here, and that is Mr. Bruce Selya, who is a resident of Rhode Island, and is on your agenda to be a U.S. district judge for the District of Rhode Island.

This is not what I came over for, but I can't pass up the opportunity to say that I have known Mr. Selya for some time, and I commend him on his nomination, and the President for making it, and for Senator Chafee for recommending him, and Senator Pell.

I have known him for a long time, and I would like to take this moment to add my endorsement to that of many others for his nomination as well.

So, Mr. Chairman, I commend Judge Wellford to your tender mercies and that of the committee. I am sure he will answer your questions carefully and with great attention to the detail they will deserve. He will be forthright in his responses.

I have no doubt in my mind that his outstanding record as a U.S. district judge and, prior to that time, as a trial lawyer, will stand him in good stead in this examination, and I urge that the committee may report him favorably so that the entire Senate may debate that nomination and confirm him to that high position.

Mr. Chairman, could I ask the indulgence of the committee and of my colleague, Senator Sasser, and particularly of Judge Wellford in asking to be excused prior to Senator Sasser's remarks and the examination of Judge Wellford. I have another commitment that I must keep on the floor, and I find that if I am away from the floor too long that it does not always work well.

I would like to return there, if I may.

The CHAIRMAN. We are honored to have you here, Senator, and I am sure your high recommendation of Judge Wellford will put him over.

Any of the Senators here, of course, are excused after they make their presentation. We have several subjects here, and we will take those first and hear from the appointees.

Senator Sasser, you have words to say, I presume?

STATEMENT OF HON. JAMES R. SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator SASSER. Thank you, Mr. Chairman. I am pleased to be here today and to join with the distinguished majority leader and my senatorial colleague from Tennessee in presenting to you, Mr. Chairman, and your distinguished committee, the Honorable Harry Wellford from Memphis, Tenn., a nominee for the appointment to the U.S. Court of Appeals for the Sixth Circuit.

May I say, Mr. Chairman, that Judge Wellford has served with distinction as a judge of the Western District of the Federal Court in Tennessee, and he has unfailingly demonstrated a judicial temperament and an ability to assess and define complex legal issues.

His rulings have been on the basis of fairness and on the basis of objectivity. One of the attorneys who has practiced in his court wrote me this letter about Judge Wellford, Mr. Chairman, and with your permission I will quote from it.

The letter reads:

> I have found him, Judge Wellford, to be scholarly and thorough, with an ability to deftly separate the wheat from the chaff.

Mr. Chairman, that is an asset of judicial perception that is vital to anyone who sits on a Federal bench. Judge Wellford is a native of Memphis, Tenn., and was graduated from my alma mater, the Vanderbilt Law School, in Nashville, Tenn., which, I can say at the risk of sounding immodest, is one of the foremost law schools in this country.

He served in the U.S. Navy during World War II, has practiced law with a prestigious firm in Memphis for over 20 years before being appointed to be the U.S. district judge for the Western District of Tennessee in 1971. He has served there with distinction since 1971.

Mr. Chairman, your files are replete with biographical data on Judge Wellford. Just let me close by saying that he has vast experience in the practice of law and on the bench, and has distinguished himself in both categories.

So I am pleased to join with my senior colleague, Senator Baker, in commending Judge Wellford to you as a highly qualified nominee for the position of the Sixth Circuit Court of Appeals.

The **Chairman**. Thank you. We are very pleased to have you speak in behalf of Judge Wellford, and I am sure those words will be of great benefit to him.

Senator **Sasser**. Thank you, Mr. Chairman.

The **Chairman**. If you wish to leave now, I think I will ask Judge Wellford to have a seat in the back until we take the Senators who are here on behalf of their appointees.

Next, we have Judge Antonin Scalia of Illinois, to be circuit judge for the D.C. Circuit Court of Appeals.

Senator Percy, I observe, is here. If you would, come around. Senator Percy, we will be glad to hear from you. Senator Percy is the able and distinguished chairman of the Foreign Relations Committee, and he is doing a fine job.

STATEMENT OF HON. CHARLES H. PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator **Percy**. Mr. Chairman, I want to join the majority leader in congratulating you on the job you did today. I have admired the way you have worked and operated in the Congress, but never have I seen you in better form. The fact that there was not a single Senator down in the well—every one was at their seats—I think we all recognized the responsibility we had when we offered an amendment to the Constitution of the United States of America, and we took that seriously, and I was proud to cosponsor it.

The **Chairman**. Thank you, Senator, for your kind words. We were able to do it because of strong people like you to help us.

Senator **Percy**. Thank you.

The **Chairman**. I believe you have another man from Illinois, Mr. Michael M. Mihm, for district judge. I presume you want to speak for both of them.

Senator **Percy**. I will introduce both of them. I am not going to ask Professor Scalia to introduce his children. First, they are not here, and there are so many of them that they would fill the room. He has nine children he will be bringing down to Washington, D.C., and we are depleting our population in Chicago with that exodus.

The **Chairman**. Would you like for me to have the families stand?

Senator **Percy**. Mr. Mihm's family is here, and it might be appropriate for Mr. Mihm to not only introduce his wife, Judy, but their four children, and Judy's parents.

Mr. **Mihm**. Thank you, Senator. My mother-in-law and father-in-law, Alna and Maizie Zosky; my wife, Judy; my children, Molly, Sarah, Jennifer and Jacob.

The **Chairman**. How many children have you, four?

Mr. **Mihm**. Four.

The **Chairman**. Well, you have caught up with me. [Laughter.]

Mr. **Mihm**. I won't pass you.

The **Chairman**. How old is your youngest?

Mr. **Mihm**. Five years old.

The **Chairman**. Mine is 6. They are pretty near the same age.

Senator PERCY. I might say, Professor Scalia's children range in age from 2 to 21, and I thought of you, Mr. Chairman. While I am having grandchildren, you are having children.

I am pleased indeed to introduce to you Professor Scalia for the hearing on his nomination to be the judge on the U.S. Circuit Court of Appeals for the District of Columbia. He has had a distinguished career, both as a public servant and an academician. He graduated from Harvard Law School in 1960. He practiced law from 1960 to 1967, and in 1967 Mr. Scalia became professor of law at the University of Virginia.

Beginning in 1970, he held several positions of public service with the Federal Government, including general counsel of the Office of Telecommunications Policy, chairman of the Administrative Conference of the United States, and assistant attorney general.

Following his Government service, Mr. Scalia returned to his academic pursuits, first to Georgetown University, and then to the American Enterprise Institute, and since 1977 has been at the University of Chicago Law School.

I had the pleasure of working briefly with Professor Scalia when he was at the Department of Justice, and am very pleased that he saw the light and joined the faculty of the University of Chicago, where I have been privileged to be a trustee for 32 years now.

Professor Scalia is a scholar. I commend him to this committee for, I trust, its overwhelming support, and the support of the Senate as well.

I also take pleasure in introducing Mr. Michael Mihm to the committee for the hearing on his nomination to the U. S. District Court for the Central District of Illinois.

I recommended Mr. Mihm to the President after a very thorough search for the best possible candidates and consideration of the top contenders. At this time, I would like to again pay special tribute both to the Illinois State Bar Association and a special review group composed of the representatives of the Peoria, Springfield, Rock Island, Bloomington, Champaign, Sangamon, and Galesburg Bar Associations. These groups of distinguished attorneys carefully and impartially considered the qualifications of the top candidates for the judgeship.

Based on their recommendations and my own personal review, and an interview with Mike Mihm, I wholeheartedly recommended him to the President.

Let me note for the record that he grew up on a farm south of Dixon, Ill., the President's hometown. He was the assistant State's attorney for Peoria County, Ill., assistant corporation counsel for the City of Peoria, and State's attorney for Peoria County before entering private practice there in 1980.

I believe Mike Mihm exemplifies the intellectual and personal temperament we want to see in our Federal judiciary, and I have no hesitancy in commending him to this committee and to you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Percy. We appreciate your taking time from your busy schedule to come here to speak in behalf of these two gentlemen. I am sure what you said about them will result in heir confirmation. We are pleased to have you with us.

Senator PERCY. Thank you.

The CHAIRMAN. I have not sworn you yet. While you are there, I might swear you.

Do you solemly swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SCALIA. I do.

Mr. MIHM. I do.

The CHAIRMAN. Now, our next appointee is Mr. Bruce M. Selya, of Rhode Island, to be U. S. district judge for the District of Rhode Island. The distinguished Senators from Rhode Island will come around, and we will be glad to hear from them.

Senator, you may proceed.

STATEMENT OF HON. JOHN H. CHAFEE, A. U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Mr. Chairman, I wish first to thank you very much for the expeditious manner in which you and your committee and the staff have processed these nominations. I would like to join in the congratulations, also, for your great victory today on the floor. Although I was on the opposite side, you and I have been associated many times in battles on the floor. I was thinking recently of the agent's identities bill, and I have come to the conclusion I would rather be with you than against you.

The CHAIRMAN. Thank you for your kind words. Next time, maybe we can be together.

Senator CHAFEE. I look forward to it, because I want to be on the winning side, and I find that being on the Thurmond side is usually the winning side, because of you abilities.

It is my great privilege, Mr. Chairman, to introduce to you and the committee a long-time friend, a man for whom I have great admiration and affection over many years, Bruce M. Selya.

Mr. Selya is a graduate of the public schools in Providence, R.I., He attended Harvard College and Harvard Law School, where he was graduated from both institutions with the ranking of magna cum laude.

In addition, he was a John Harvard Scholar, which is a position of some eminence.

After graduating from law school, he clerked for our Federal district judge for 2 years in Providence, and then entered the private practice of law, where he has had a most successful and distinguished career. His career has particularly been marked by a great deal of trial experience and experience in the Federal courts.

In addition, Mr. Chairman, I would point out that it seems to me he exemplifies not only success at the bar, and in publications and in lectures on legal matters, but he has also devoted himself to public life.

By that, I mean he has stepped out and entered into the political sphere, running for Rhode Island attorney general in 1964, but more importantly, I think, devoting literally hundreds of hours to the cause of candidates, with nothing sought to gain in any way.

Mr. Selya just felt it was in the best interests of the State and of the Nation to assist what he regarded as capable people. As such he has not only helped others in the political sphere, but he has been instrumental in assisting me in campaigns for the governorship and for the Senate, and in those efforts he has been tremendously giving of his time and energies.

So, Mr. Chairman, I heartily recommend to you for the position of Federal district judge in Rhode Island Mr. Bruce M. Selya, who is here, and indeed his family is here, and if you would choose, they may be introduced.

The CHAIRMAN. Would you like to have him present his family?

Mr. SELYA. Thank you, Mr. Chairman. I would like to present my wife, Ellen, and my two daughters, Dawn and Lori Ann.

The CHAIRMAN. We are very pleased to have your family here.

Mr. SELYA. Thank you very much, Mr. Chairman. We are all delighted to be here.

Senator CHAFEE. In conclusion, Mr. Chairman, as it has been in so many places in the Nation, the Federal bench in our State is looked on with great respect. I must say that lawyers want to come there to try their cases, and clients want to have their cases tried there, because we have had a series of outstanding judges, and I believe—I am absolutely confident—that Mr. Selya will carry on that wonderful tradition.

The CHAIRMAN. Senator, you have made laudatory remarks about Mr. Selya. With your fine recommendation, I am sure he will be confirmed.

Senator Pell?

STATEMENT OF HON. CLAIBORNE PELL, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator PELL. Thank you, Mr. Chairman. I would like to add a word and say that I am very glad to support Mr. Selya as a candidate, with my colleague, Senator Chafee.

Mr. Selya is a man of fine reputation, highly regarded in our State of Rhode Island, and I know his talent will be put to good use on the Federal bench, and is needed on the Federal bench because there is quite a backlog of cases. The sooner he gets confirmed, the happier we will be in Rhode Island.

The CHAIRMAN. Thank you very much, Senator. We appreciate your presence here today, too. We thank both of you distinguished Senators, and we will try to expedite this nomination, and if we can get through here by 3 o'clock, maybe we can get him confirmed from the committee this afternoon. I promised Senator Chafee I would try to do that if possible. We will do our best, Senators.

Senator CHAFEE. Thank you so much.

For the record, Mr. Chairman, I would submit an excellent editorial in our leading newspaper in our State, which speaks in high praise of Mr. Selya, and it seems to me the language and the thoughts in that editorial really epitomize not only what I feel, but the belief all our citizens feel who have any connection with our courts, or with Mr. Selya.

The CHAIRMAN. Would you like this to be put in the record?

Senator **Chafee**. I would, if it is agreeable with you, Mr. Chairman.

The **Chairman**. Without objection, this editorial will be placed in the record in behalf of Mr. Selya's nomination.

[The editorial follows:]

[From the Providence Journal, Providence, R.I., July 29, 1982]

Sound Choice for Federal Court

President Reagan has chosen wisely in appointing Bruce M. Selya to the U.S. District Court in Rhode Island. Politics aside—and Mr. Selya's longtime association with U.S. Sen. John H. Chafee obviously figured in his selection—this nominee unquestionably promises to serve with distinction as a federal judge. Rhode Island Democrats as well as Republicans agree to that. U.S. Senate approval should be automatic.

Since his involvement 20 years ago in the GOP inner circle that produced the first of three Chafee gubernatorial terms, Mr. Selya, 48, has exemplified a good citizen's interest in such affairs of government. He developed a busy private law practice, but remained active publicly in the best tradition of the American political system. Although he is a partisan, his reputation for integrity, intelligence and level-headedness won him respect across party lines.

These same qualities brought him success as an attorney and are the essential ingredients of a good judge. A Providence resident and a graduate of Classical and of Harvard and its law school, Mr. Selya describes himself as a "pragmatic person" and that is another good attribute for the bench. His experiences in the rough world of election campaigns (once as a candidate himself for attorney general in 1964) and as a trial lawyer should strengthen a practical approach to dispensing justice.

The federal court in Rhode Island is certain to benefit with Mr. Selya as one of its jurists.

The **Chairman**. Mr, Selya, these Senators have to go. If you would stand up and be sworn, and then have a seat in the back, we will take the nominees in the order they were sworn.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Selya**. Yes. I do.

TESTIMONY OF HARRY W. WELLFORD, NOMINEE, CIRCUIT JUDGE, SIXTH CIRCUIT COURT OF APPEALS

The **Chairman**. Now, Judge Wellford, will you come around?

Judge **Wellford**. Would you like me to stand, or be seated?

The **Chairman**. Please be seated.

Judge **Wellford**. All right, sir.

The **Chairman**. We are very pleased to have you.

Judge Wellford, you have been recommended highly by both of your Senators here, and that is a fine tribute to you. You could not have been selected by a finer man than Senator Baker.

Judge **Wellford**. Thank you, sir.

The **Chairman**. You are to be commended in the manner in which you have handled the docket of your court, which I understand is heavy. It is my understanding that your court consistently handles the greatest number of criminal cases insofar as trials and disposition are concerned. To what do you attribute this success, and are there any recommendations you might make that would assist other judges in this area?

Judge **Wellford**. Senator, I would have to say that the Speedy Trial Act passed by the Congress has had some bearing on the number of criminal cases that have rapidly come to our court.

The only answer I can give is a brief one, that we work hard, the judges of our court work hard, daily, in giving every attention to disposing of the cases as rapidly as we possibly can. We have an accumulated docket. We try as hard as possible to move the cases and to dispose of them as quickly as possible to do so.

The CHAIRMAN. Judge, the Western District of Tennessee's record of efficient jury usage is said to be the result of the interaction of an interested bench and an innovative staff, using management techniques well suited to its particular requirements. Would you tell the committee what some of these management techniques are and how they are applied in your court?

Judge WELLFORD. I take no particular credit. All of us as judges in our court are very concerned about the efficient usage of jurors. We try to, all of us, select juries the same day from one panel, sometimes to pick more than one jury panel on cases on a particular day so that as many jurors who are summoned will be used as possible without being dismissed without the opportunity to serve.

The CHAIRMAN. Judge Wellford, would you please tell the committee the circumstances surrounding the reduction in the jail sentence of Mr. Emmett Ford? Mr. Ford, as I understand it, had been sentenced to a 20-month Federal prison term after being convicted on insurance fraud charges, with the sentence later being reduced to 8 months.

Judge WELLFORD. Yes. A difficult trial, involving a political figure in our community. He happened to be the brother of a Congressman. He was convicted and sentenced to 20 months. The case was appealed, and unanimously confirmed. Therefore, there was a request for suspension and probation. The defendant began his service, an investigation was made. The probate office of our court was asked to investigate all the circumstances, a change of circumstances which had been indicated with regard to his service.

The court considered carefully the probation report, recommending an amendment and reduction in that sentence.

At the time the decision was made by this judge to reduce the sentence, I realized that it was a matter of controversy, that my name would be pending at that time. I made the decision which I felt was appropriate and in accordance with recommendations which were made and the circumstances made known to the court.

The CHAIRMAN. I believe you received some criticisms when you sentenced a man as being too strict.

Judge WELLFORD. At the time of the original sentence, there was public criticism from some sources that the court's sentence was excessive. At the time that the sentence was changed to 8 months, plus 2 additional months on a transitional center basis, there was some criticism from others that the reduction was not appropriate. I have been criticized in that respect from both sides, Senator.

The CHAIRMAN. So, either way you went, you got criticized.

Judge WELLFORD. Yes, sir.

The CHAIRMAN. Judge Wellford, would you give me the facts in the *EEOC* vs. *Union Planter's National Bank* case, which I understand is before your court at the present time?

Judge WELLFORD. This is one of the oldest cases on the court's docket. It arose out of charges before the EEOC. It is a complex case, charging virtually every department in a local bank with alleged race and sex discrimination. There have been hundreds of witnesses over the lengthy time in the hearing of that case, thousands of pages of transcript, of exhibits, of statistical evidence. The court has tried to consider all of those matters, and we are in the throes of trying to come to what we hope is a proper conclusion in light of all the circumstances in a very difficult and complex case.

The CHAIRMAN. Do you have any idea when that will be completed?

Judge WELLFORD. Yes, sir. I have an idea that this should be completed within the next 2 months.

The CHAIRMAN. Now, in regard to judicial activism, and I don't know whether you know it or not, but I am somewhat opposed to judicial activism. I think we have three branches of Government. We have the Congress to make the law, we have the executive branch to implement the law, and the judicial branch to interpret the law. I think each branch should stay in its own sphere.

I notice in your report to the committee you say that only in rare situations should the judiciary institute problem solving on broadscale issues.

Would you comment on that and your general attitude toward judicial activism?

Judge WELLFORD. Yes, sir. I think it is improper for a judge to comment with respect to any case or any specific principle that might come before us for a decision. I think each case, of course, must stand on its own individual merits. I happen to be a traditionalist. I think that it is only in the rare circumstance that a court should depart from a precedent, but the court must stand by its responsibility, in every case, to abide by the Constitution as we see it, and as it has been interpreted and as we follow in our conscience.

I would not disagree with your statement that courts should be slow to move beyond the bounds of tradition and restraint and precedent.

The CHAIRMAN. Judge, the class action provision of rule 23 of the Federal Rules of Civil Procedure has often been abused. Many courts have limited the Federal Rules to some degree in this type of proceeding. Would you give the committee your views on ways to curb such abuses and do you feel that limitations should be placed on rule 23?

Judge WELLFORD. As you know, Mr. Chairman, there are suggested revisions to the Federal Rules of Procedure, rule 23, that deal with class actions. The courts have been very concerned with the extent of discovery and the abuse of discovery proceedings, sometimes, with regard to class actions.

The judges feel that the Congress may appropriately and within the rulemaking authority review carefully rule 23 and its ramifications. This judge believes that the court should view carefully the limits of classes, the reasonable basis of classes being before the court, or subclasses, and the quality of representation that is before us.

Rule 23 deserves careful consideration by the courts and the Congress in its present form.

The CHAIRMAN. I believe we have two witnesses who wanted to say a word, and we have a hearing here in 20 minutes. We have to rush along. If they would come up and express themselves, and if they want to take over 2 or 3 minutes I think it would be better to put the statement in the record.

You might stand up and be sworn. The testimony that you shall give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge HORTON. I do.

Mr. TATE. I do.

The CHAIRMAN. I believe, Judge Odell Horton, you are the judge of the Western District of Tennessee.

STATEMENT OF HON. ODELL HORTON, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TENNESSEE, MEMPHIS, TENN.

Judge HORTON. Yes, sir, Mr. Chairman, I am Odell Horton, and I am a judge in the Western District of Tennessee, and a colleague of Judge Wellford's.

The CHAIRMAN. Would you care to make a statement?

Judge HORTON. Yes, sir.

Mr. Chairman, and members of the committee: It is a real honor for me to come here today and speak on behalf of the nomination of my colleague, Judge Harry Wellford. I have been his colleague since May 1980, and in the course of our work, Mr. Chairman, we meet every Thursday with the chief judge of our court and we go over all sorts of matters pertaining to how we conduct the operation of our court. We resolve many issues and discuss many matters.

It is in that context, Mr. Chairman, that I have come to know well my colleague. He is an outstanding judge, he is an impeccable gentleman always. He respects his colleagues, and I can state, Mr. Chairman, that he has never at any time attempted to influence the judgments in my division of our court.

Judge Wellford and Mrs. Wellford have been friends of ours. When I was sworn in as a district judge in Memphis, they very graciously hosted a dinner for my wife and for me. We have carried that friendship on since that time, Mr. Chairman, in a magnificent way, and I am here, Mr. Chairman, to simply state to you that Judge Wellford has those qualifications that you search for in U.S. district judges, and in circuit judges.

In concluding, Mr. Chairman, I have also had the opportunity of serving on two separate occasions as a designated judge on the U.S. Court of Appeals for the Sixth Circuit. I have come to realize what qualities render a judge really qualified to serve in such an exalted position. Judge Wellford meets those qualifications and possesses those qualities, and I heartily commend him to you and to the committee.

The CHAIRMAN. Thank you very much.

We will be very pleased to hear from S. Shepherd Tate. I believe you were the former president of the American Bar Association.

Mr. TATE. Yes, Mr. Chairman.

The CHAIRMAN. We are honored to have you here.

STATEMENT OF S. SHEPHERD TATE, ATTORNEY, MEMPHIS, TENN.

Mr. TATE. It is a pleasure to be here today. I am an attorney in Memphis, Tenn., and I have known Harry Wellford most of his life, and it is my pleasure to speak in favor of his confirmation as a judge of the U.S. Court of Appeals for the Sixth Judicial Circuit.

In 35 years as a practicing lawyer, and also through my involvement in the American Bar Association, the Tennessee Bar Association and the Memphis and Shelby County Bar Associations, in each of which I had the privilege to serve as president, I have had the occasion to observe and work with many, many lawyers and judges, and in view of this experience I believe that I am able to comment on Judge Wellford's special qualifications to be a member of the Sixth Circuit Court of Appeals.

In contemplating what I would say to you today, Mr. Chairman, I focused on the qualities which I believe a good judge should have, including intelligence, ability, fairness, honesty, diligence and judicial temperament. I believe that Judge Wellford possesses all of these.

At Washington and Lee University, Harry was graduated cum laude, and was a member of Phi Beta Kappa, and as Senator Sasser just said, he attended the Vanderbilt University School of Law, where he was graduated high in his class.

The lawyers who appear before Judge Wellford recognize in him an uncommon patience and fine judicial temperament. He is known to be fair and a tireless worker.

In 1946, I had the pleasure and privilege to serve as law clerk to Judge John D. Martin of Memphis, who was a member, and later chief judge, of the sixth circuit, and I have the greatest respect for that court, and would not presume to speak in favor of anyone to be on that court if I did not think that person possessed unquestioned integrity.

I know Harry Wellford, and I know him to be honest and to have true commitment to the highest standards of judicial ethics. It is my sincere opinion that Harry Wellford, upon his elevation to the sixth circuit, will honor that court and render a great service to the public in the administration of justice.

I thank you for this opportunity to be here today and speak in favor of Judge Harry W. Wellford.

The CHAIRMAN. Thank you very much, Mr. Tate, and Judge Wellford, and Judge Horton.

Both of these gentlemen are men of stature, and have fine reputations, and they have spoken highly of you, Judge Wellford, and I know you appreciate it.

Now, we will excuse you and call the next appointee.

TESTIMONY OF ANTONIN SCALIA, NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

The CHAIRMAN. Mr. Scalia, would you come around?

You are nominated to be circuit judge for the District of Columbia Circuit Court of Appeals. I understand in addition to being the editor of Regulation magazine, you have also authored a number of articles for the magazine. One was entitled, "The Freedom of Information Act Has No Clothes." It states:

> Almost all the Freedom of Information Act's problems are attributable not to the original legislation enacted in 1966, but to the 1974 amendments.

Mr. Scalia, exactly what do you consider to be the major problems created by the 1974 amendments?

Mr. SCALIA. Well, let me make it clear at the outset, Mr. Chairman, that that article came from the days which, if I am confirmed, would be bygone days—days in which as a private citizen I could comment on the wisdom of laws which the Congress had enacted. Needless to say, my views on the wisdom would have nothing to do with my interpretation of it were I sitting as a judge.

However, addressing what seemed to me the imprudence of that legislation, the excesses that I saw in the Freedom of Information Act were several. First of all, the 1974 amendments changed the original statute so that a large portion of the costs for processing the information that had to be given to the private citizen would no longer be paid for by the private citizen, but rather would be paid for by the Government. That seemed to me unnecessary. There are many other services which a citizen requires of his government which he must pay for on his own, and that particular one, it seemed to me, should not have been done at public expense. It is enough that the information is given to him, but it seemed to me that the processing costs under the act should have been left on the requesting individual, who is often a large corporation.

Another example of the excesses—and I stress that they are all excesses in the pursuit of a desirable goal, but they are nontheless excesses—is the authorization of attorneys' fees for the plaintiff who goes to court and persuades the court that the agency wrongfully withheld information. In many other situations where the Government is on the wrong side of litigation, even when the Government prosecutes you criminally, you have to pay your own attorneys' fees. It didn't seem to me that the area of freedom of information requests was so vitally important that it justified that payment in preference to payments in many other cases.

Finally, I might mention the standard of review of freedom of information denials which the 1974 amendments implemented, which is a de novo standard of review. An agency in other fields may take quite serious action against an individual and the courts must affirm it unless the action was unreasonable—not simply wrong in the court's view, but unreasonable, arbitrary, and capricious. Under the Freedom of Information Act, on the other hand, the court reviews the entire matter de novo and does not give the agency the benefit of the doubt. I could go on.

The CHAIRMAN. Thank you. That is splendid.

Now, Mr. Scalia, Freedom of Information Act appeals take precedence on the docket over all cases and are assigned for hearing and trial or for argument at the earliest practicable date. The only exceptions to this preferential treatment are cases the court considers of greater importance. Mr. Scalia, would you briefly give me your thoughts on the need for Freedom of Information Act appeals to receive this type of treatment?

Mr. SCALIA. Yes, sir, I will. A particular Freedom of Information Act appeal may be time critical, so to speak, and require fast processing. But the issue here is whether generically all Freedom of Information appeals deserve that kind of treatment, because the statute applies that treatment generically. It seems to me there is no basis for saying that as a class these are the most important cases in the Federal courts.

The CHAIRMAN. Thank you. Mr. Scalia, you informed the committee that you would recuse yourself from any case in which a conflict of interest might exist. I wonder, however, what criteria you would use in determining that there was in fact such a conflict?

Mr. SCALIA. I would consult, of course, Mr. Chairman, the canons of judicial ethics. As far as my own personal soul search is concerned, I would disqualify myself in any case in which I believed my connection with one of the litigants or any other circumstances would cause my judgment to be distorted in favor of or against one of the parties. I would furthermore disqualify myself if a situation arose in which, even though my judgment would not be distorted, a reasonable person would believe that my judgment would be distorted. That does not mean anybody in the world, but a reasonable person.

The CHAIRMAN. Mr. Scalia, what is your understanding of the term "American Federalism," and to what extent, in your view, is the 10th amendment to the Constitution an affirmative grant of authority to the States?

Mr. SCALIA. What I understand by American Federalism is our system of dual sovereignty, so to speak, whereby the Federal Government has jurisdiction over certain matters, and the States have jurisdiction over certain matters.

As to whether the 10th amendment is a grant of any authority to the States, the States did not need a grant of authority. The Supreme Court has said in some cases that the 10th amendment is redundant, and I think that is accurate. It is redundant because it is clear under the original Constitution that the Federal Government is a government of specified powers, and that unless those powers have been affirmatively granted to the Federal Government, they automatically remain with the States.

The CHAIRMAN. The Constitution is clear on the fact that unless a power has been specifically delegated to the Union, it is reserved to the States, is it not?

Mr. SCALIA. Absolutely clear, Mr. Chairman.

The CHAIRMAN. Now, without objection, we are going to place your biography in the record. Those are all the questions we have, and I hope you have a nice service on the bench. We will excuse you now.

Mr. Mihm is next. Mr. Mihm, if you will, come around.

Mr. MIHM. Yes, sir.

The CHAIRMAN. Mr. Mihm, without objection, we will place your biography in the record.

TESTIMONY OF MICHAEL M. MIHM, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF ILLINOIS

The CHAIRMAN. Mr. Mihm, I recently introduced the Violent Crime and Drug Enforcement Improvement Act of 1982. A provision of this act calls for amendments affecting insanity defense and mental competency. One feature closes a loophole in current law by providing a Federal commitment procedure for a dangerous Federal defendant found not guilty, by reason of insanity, if no State will commit him. Another aspect of this title would replace the current Federal insanity defense with a narrower defense applicable only to those individuals who were so mentally ill that they could not form the mental state required for the crime. Mr. Mihm, would you give me your views on the need for reform of the insanity defense? If you would, make that very brief.

Mr. MIHM. As you know from the record, I spent much of my public career as a prosecutor and in the course of prosecuting cases I have run into many situations involving just this type of issue.

As a judge, of course, I would interpret the law as it is. I would point out, however, that Illinois is one of the States which has adopted legislation, I believe, similar to what is under consideration in Congress, which establishes a guilty but mentally ill defense.

No piece of legislation like that is without problems, but it is my opinion that that type of legislation is the direction in which we should move.

The CHAIRMAN. Mr. Mihm, do you feel that a district court judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Mr. MIHM. Let me just say this, Senator: I think a judge should be in control of his courtroom. I certainly believe the lawyers involved in the litigation should try the case, but the judge should control the courtroom and the processes that occur in that courtroom.

The CHAIRMAN. Mr. Mihm, I consider judicial temperament to be a prerequisite for a Federal judge. Would you please give me your thoughts on this subject? I have seen some judges abuse attorneys and jurors and witnesses, and some of the public, and I think it is an entirely inexcusable thing to do that.

Mr. MIHM. I believe that especially in this type of process, where you are talking about a lifetime appointment, that you really are taking the whole person, not just taking someone's academic credentials. A person is needed in this type of position who has an ability to get along with other people on a daily basis, to be understanding and in some cases merciful, but at the same time, again, never losing sight of the fact as to who is the judge and who are the attorneys, and who are the people appearing in front of the bench.

I believe it is possible to do all of those things and still be kind and courteous to everyone.

The CHAIRMAN. Mr. Mihm, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or Constitution provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. MIHM. A lawyer always hesitates to answer a question with one word, but in this case I would be tempted to say simply "no."

The CHAIRMAN. I think those are all the questions I have. I note the able and distinguished Senator from Alabama has come in, a former Chief Justice of the Supreme Court of Alabama. Senator, do you have any questions?

Senator HEFLIN. I have no questions.

The CHAIRMAN. We will now excuse you, and I wish you well on the bench.

Mr. MIHM. Thank you.

The CHAIRMAN. If Mr. Bruce Selya will come around. Mr. Selya, you have already been sworn. Without objection, I will place your biography in the record to save time.

Mr. SELYA. Thank you.

TESTIMONY OF BRUCE M. SELYA, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF RHODE ISLAND

The Chairman. I just have a few questions here.

You have been a practicing attorney since 1960. Now you have been nominated for the position of U.S. district court judge for the District of Rhode Island. What do you feel will be the most rewarding aspect of serving in this capacity?

Mr. SELYA. I think that many of us who have been in the private practice of law recognize that although we have been serving clients, we have basically been utilizing a system that exists legitimately for the benefit of our clients. It seems to me to be able to contribute to the system instead of just being a user, as it were, of the system, to be able to make that kind of contribution to the social fabric of your times, would to me be the most gratifying aspect of this type of service.

The CHAIRMAN. Thank you.

Mr. Selya, you are an officer and/or director of a number of Rhode Island corporations. I realize that it is common practice in your State for an attorney to serve in this capacity without remuneration. There are other corporations, however, where you are an equity participant. Would you tell the committee how you will resolve any potential conflict of interest that may arise in these areas, including the procedure you will be following in making that determination?

Mr. SELYA. Yes, sir. It is my intention first and foremost, Mr. Chairman, to handle my private business dealings in a manner completely consonant with the Canons of Judicial Ethics and with the ethical standards promulgated by the judicial conference and its appropriate committees.

That, in my view, will require my resignation of a wide variety of corporate offices which I presently hold. That resignation, or those resignations, I am willing to tender upon my assumption of judicial office. It will also include, in my judgment, divesting myself of any role in the management as opposed to a role as a passive investor in any corporations in which I may hold an equity interest.

Perhaps the sole exception to that panoply which comes to my mind is in connection with a business which is actually comprised of two corporations that is owned entirely by members of my immediate family, and to the extent it is ethically permissible, it is my present intention to remain as a director of those two corporations. It is further my understanding from the advisory committee of the judicial conference that such would be ethically permissible.

If that is wrong, I would resign those as well.

The CHAIRMAN. For the record, I believe you should name those.

Mr. SEYLA. Yes. The two corporations which together form what I view as one company are Isochem, I-s-o-c-h-e-m, Resins Co., and Isochem Enterprises.

The CHAIRMAN. You say that you believe it would be helpful to you as a U.S. district court judge to have a sentencing commission to establish uniformity in sentencing?

Mr. SELYA. I believe it would be most helpful, Mr. Chairman, so long as the intendment of that committee or commission would be to establish guidelines for the use and guidance of the district courts in the sentencing procedure, as opposed to inflexible, mandatory sentences which would strip discretion from the district courts to react either to exacerbated cases or cases with extenuating circumstances.

The CHAIRMAN. Mr. Selya, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Mr. SELYA. I think, Mr. Chairman, that anyone who assumes judicial office is duty bound to follow the law as it is written, and as he interprets it, and that that must override any such conflict.

The CHAIRMAN. The distinguished Senator from Alabama, Senator Denton, has indicated he has some questions that he would like you to respond to in writing, and so if you could do that.

Mr. SELYA. I would be happy to.

[Subsequent to the hearing, the committee received the following information:]

SELYA AND IANNUCCILLO, INC.,
Providence, R.I., August 10, 1982.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee,
Washington, D.C.
Attention: Duke Short.

DEAR MR. CHAIRMAN. I acknowledge receipt, with thanks, of a copy of Senator Denton's letter dated August 6, 1982, and to the questions and commentary transmitted therewith. I will attempt to answer these questions seriatim in the same order in which they have been posed by Senator Denton. In each instance, I have prefaced my answer by reiteration of the question, for ease in reference.

Question. 1.—Do you believe that the Supreme Court of the United States in deciding *Roe* v. *Wade* in 1973 performed its task of constitutional adjudication in conformance with appropriate and established methods?

Answer.—I believe that *Roe* v. *Wade* represented a good faith effort by the Supreme Court of the United States, as then constituted, to address the constitutional issues presented therein. Since that decision stands as the law of the land until overridden by constitutional amendment or reversed or modified by the Supreme Court, I deem any further comment on my part to be inappropriate.

Question. 2.—In your opinion, was the case of *Roe* v. *Wade* wrongly decided?

Answer.—Please refer to the preceding answer. It is not, in my view, the prerogative of a District Judge or of a nominee to the District Court to fly in the face of a clear precedent enunciated by the Supreme Court of the United States. A nisi prius Judge must subordinate his personal views to the plain language and purport of precedent, judicial and/or statutory. Holding as I do this view, I must refrain from a direct answer to this question.

Question. 3.—In your opinion, does the Constitution actually forbid states from protecting unborn human beings prior to the point of "viability"?

Answer.—No. Each such legislative initiative, however, must (as with virtually all other State statutes) be viewed in terms of its particular scope and language, and must be able independently to withstand constitutional scrutiny.

Question. 4.—Do you consider the Human Life Statute concept as embodied in S. 2148 to be constitutional?

Answer.—I do not deem it proper to comment upon the constitutionality or legality of a particular piece of proposed legislation which may, if I am confirmed, come before me for review in my judicial capacity. I can state, however, that certain of the areas with which S. 2148 deals are, generally, in my view appropriate subjects for Congressional action (e.g., the appropriation limitations contained in Section 4 of S. 2148, and the expedited review provision contained in Section 9 of said S. 2148).

Question. 5.—Should defective unborn children be accorded the full protection of the 14th amendment to the U.S. Constitution?

Answer.—It is my belief that "defective" unborn children should be treated identically to "normal" unborn children as respects the full protection of the constitution and laws of the United States.

Question. 6.—What is your view on the duty of the federal courts in protecting such innocent life?

Answer.—I agree with President Reagan's statement that the protection of innocent life is a legitimate duty of government; and I believe that it is the duty of the federal courts to accord to such innocent life the full protection of the constitution of the United States.

Question 7.—What is your view on the question of parental notification and/or consent for the provision of abortion and birth control services to minor teenagers?

Answer.—I am *personally,* as a parent of two minor daughters, in favor of the concepts, aims and objectives of parental notification and/or consent for the provision of abortion and birth control services to minor teenagers. As a jurist, I would perforce have to evaluate any statute(s) making provision for such parental notification and/or consent in a context apart from my personal beliefs and in light of the applicable precedents and law.

Question 8.—What is your view on the rights of student groups to participate in group or individual voluntary prayer in public schools?

Answer.—While I personally have no objection to voluntary, non-denominational prayer in schools and other facilities—so long as it truly is voluntary and is truly non-denominational—, and while I profess no great expertise on this subject, it is my understanding that, under current precedents, there is grave doubt as to the extent to which group or individual voluntary non-denominational prayer may be permissible (if at all) in public schools; and my personal beliefs in this area would, as a District Judge, necessarily be subordinated to the law of the land.

Question 9.—Do you agree or disagree with Professor Paul Brest's thesis concerning constitutional decision-making as stated in his article entitled "The Misconceived Quest for the Original Understanding" 60 Boston University Law Review 204-1980 and especially as summarized at pages 226-238?

Answer.—I was not familiar with Professor Brest's article until it was called to my attention by Senator Denton's letter. I have since read the article in its entirety, and find it to be thought-provoking. While I am not persuaded that nonoriginalist adjudication is more conducive to the protection of fundamental values and to the integrity of democratic processes than either strict or moderate originalism, and while I believe that my initial inclination is to accord more weight than Professor Brest to the text and/or original history of constitutional doctrine(s), I have an open mind on this subject. I find it difficult to deal explicitly with these fine distinctions in the abstract, and I believe it is likely that a judicial philosophy characteristic of my own decisions, if confirmed, will only emerge empirically, i.e., after subjecting myself to the rigors involved in actually confronting and undergoing the decision-making process in litigated cases.

Question 10.—Should the proposal for a National Court of Appeals be adopted? See "Report of the Study Group on the Caseload of the Supreme Court of the U.S." (1972)?

Answer.—I do not favor this proposal. In answering this question, I must confess to somewhat of a traditionalist bias, and I would first look toward improvements (e.g., consideration of consolidation of the Circuits) in the existing structure rather than in the interposition of a new appellate tribunal into the federal judicial system. I view this decision, however, as inherently legislative in nature, with the ultimate resolution of the question lying, in my opinion, with the proper prerogative of Congress rather than internally within the judiciary.

Question 11.—Should a Commission of Appeals to the Supreme Court of the U.S. be created which would serve the function of processing all constitutional cases before they are decided by that court? Processing would include the hearing of oral arguments, reading of briefs and preparation of the recommended decision. The Commission would be composed of highly talented persons of appropriate experience in dealing with constitutional matters, who would be appointed by the President in the same manner as Supreme Court Justices to serve for a nine-year term and receive the same compensation as Supreme Court Justices. This concept is similar to that of the Texas Commission of Appeals which existed between 1876 and 1944.

Answer.—I am not in favor of this concept. I believe that my answer to the preceding question is apposite here as well. Additionally, the limited tenure to be afforded to members of the proposed Commission is to my mind an undesirable feature. Finally, while I am not familiar with the Texas experience, the fact that Texas apparently abandoned the Commission concept in 1944 would certainly give me pause.

I trust that the above is responsive to the inquiries posed by Senator Denton, and I would be happy to attempt to provide further clarification if any is desired by your Honorable Committee.

Respectfully submitted,

BRUCE M. SELYA.

The CHAIRMAN. That completes the questioning. I hope you have a nice service on the bench.

Mr. SELYA. Thank you very much, Mr. Chairman.

The CHAIRMAN. That completes our hearing, so we now stand adjourned.

[Whereupon, at 3:03 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

HARRY W. WELLFORD

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT COURT OF APPEALS

Birth: August 6, 1924, Memphis, Tenn.

Legal residence: Tennessee.

Marital status: Married to Katherine Potts Wellford, 5 children.

Education: 1942-43, 1946-47—Washington & Lee University, B.A. degree; 1943-44—Univ. of No. Carolina, V-12 program; 1944—Cornell University, V-12 program; 1947-48—University of Michigan Law School; 1948-50—Vanderbilt University Law School, LL.B. degree.

Bar: 1950—Tennessee.

Military service: 1943-46—U.S. Navy, honorable discharge.

Experience: 1950-70—McCloy, Myar & Wellford (formerly known as Snowden, Davis, McCloy & Donelson), Memphis, Tenn.; 1971 to present—U.S. District Judge, Western District of Tennessee.

ANTONIN SCALIA

NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

Birth: March 11, 1936, Trenton, N.J.

Legal residence: Illinois.

Marital status: Married to Maureen McCarthy Scalia, 9 children.

Education: 1953-57—Georgetown University, A.B. degree; 1955-56—University of Fribourg, Fribourg, Switzerland; 1957-60—Harvard Law School, LL.B. degree.

Bar: 1962—Ohio.

Experience: 1960-67—Jones, Day, Cockley & Reavis, associate; 1960-61—Harvard University Sheldon Fellow; 1967-71—University of Virginia Law School, professor; 1970—U.S. Civil Service Commission, Office of Hearing Examiners, summer faculty; 1971-72—Executive Office of the President, Office of Telecommunications Policy, General Counsel; 1972-74—Administrative Conference of the United States, Chairman; 1974-77—Department of Justice, Office of Legal Counsel, Assistant Attorney General; January 1977 to June 1977—Georgetown University Law School, visiting professor of law; January 1977 to September 1977—American Enterprise Institute, resident scholar; 1977 to present—University of Chicago Law School, professor; 1980-81—Stanford University Law School, visiting professor.

MICHAEL M. MIHM

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF ILLINOIS

Birth: May 18, 1943, Amboy, Ill.

Legal residence: Illinois.

Marital status: Married to Judith Zosky Mihm, 4 children.

Education: 1960-64—Loras College, B.A. degree; 1964-67—St. Louis University, J.D. degree.

Bar: 1967—Missouri; 1967—Illinois.

Experience: 1967-68—Assistant prosecuting attorney, St. Louis County, Mo.; 1968-69—Assistant State's attorney, Peoria County, Ill.; 1969-72—Assistant corporation counsel, city of Peoria; 1972-80—State's attorney, Peoria County; 1980 to present—Private practice, Peoria.

BRUCE M. SELYA

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF RHODE ISLAND

Birth: May 27, 1934, Providence, R.I.

Legal residence: Rhode Island.

Marital status: Married to Ellen Barnes Selya, 2 children.

Education: 1951-55—Harvard College, A.B. degree; 1955-58—Harvard Law School, LL.B. degree.

Bar: 1959-60—District of Columbia Bar, Rhode Island.

Experience: 1958-60—Law clerk to Hon. Edward Day, U.S. District Court, Providence, R.I.; 1960-74—Gunning, LaFazia, Gnys & Selya (formerly Gunning and LaFazia), Providence, R.I. (associate, 1960-62; partner, 1962 to present); 1974 to present—Selya & Iannuccillo, Providence, partner.

CONFIRMATION HEARING ON:

WILLIAM M. ACKER, JR., ROBERT A DESTRO, CONSTANTINE NICHOLAS DOMBALIS, AND MARIA GUADALUPE QUINTANILLA

WEDNESDAY, AUGUST 11, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:07 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Denton, Metzenbaum, Heflin, Leahy, and Mathias.

Staff present: Duke Short, chief investigator; Bill Christensen, investigator; Allan Spence, investigator; and Pamela Swanner, investigative clerk.

NOMINATION OF WILLIAM M. ACKER

The CHAIRMAN. The committee will come to order.

Our first nomination is U.S. district judge from Alabama.

Senator Denton and Senator Heflin are here.

You gentlemen, please be seated.

Mr. William M. Acker, I will swear you.

[Nominee sworn.]

The CHAIRMAN. Have a seat. We are glad to have you make a statement, if you care to, or——

Mr. ACKER. I have no statement.

Senator HEFLIN. I would like for Senator Denton to introduce him, if you could.

The CHAIRMAN. I thought if you all have time, you may want to wait to hear what he says.

Mr. ACKER. Maybe that is another reason for not saying anything.

But I only want to thank the committee for the opportunity to appear before you, and I will let my two good friends here do the talking.

The CHAIRMAN. All right.

Senator Denton, we would be pleased to hear from you.

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Thank you, Mr. Chairman.

Mr. Chairman, it gives me a great deal of pleasure to introduce Mr. William Acker, Jr., to the Senate Committee on the Judiciary as a nominee to be a U.S. district judge for the Northern District of Alabama. Bill Acker's personal and professional life has been marked by continuing series of achievements and honors.

As a scholar, churchman, civic leader, attorney, teacher, and family man, he has already contributed much to his native city and State. He is now about to take a new responsibility as a Federal district judge, and I can think of no man better prepared to assume that position. Bill possesses a unique combination of wisdom and experience that will make him an excellent judge.

As the committee goes about its work, I am sure that my colleagues will come to share my high opinion of Bill's capabilities. I gather Senator Heflin does.

I simply wish we had more men like him who were willing to serve their country in the judicial branch of Government. In the years ahead, Bill will certainly make important contributions to the work of the north district court.

I would urge the committee to favorably and quickly vote on his nomination so that he can begin that job.

In short, Mr. Chairman, I am proud that the President nominated an Alabamian like Bill Acker to this important position.

Congratulations.

The CHAIRMAN. We are pleased to have you here, Senator, and we will now hear from Senator Heflin.

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ABABAMA

Senator HEFLIN. It is my distinct honor and pleasure to recommend to the U.S. Senate William M. Acker of Birmingham, Ala., for the position of U.S. district court judge for the Northern District of Alabama.

As a former judge, I believe that one of the most crucial functions of those of us who serve on the Senate Judiciary Committee is the examination of fitness of judicial nominees for service on the Federal bench. Fitness to serve as a U.S. district judge should be carefully examined.

It is this entry level trial court of the Federal judiciary to which aggrieved parties look for equity and justice. The vast majority of the numerous cases filed in Federal court never reach the Supreme Court, not because they are not meritorious, but because they have been disposed of, and the parties have been given redress at the district court level. Recognizing the importance of the district court in our system of jurisprudence, it is apparent that the nomination with which we are dealing is certainly not insignificant.

I commend Senator Denton and President Reagan for this nomination. Mr. Acker has had a long and distinguished career as an outstanding attorney, and I am fully confident that he will serve with distinction upon confirmation.

No less should be expected from an alumnus of Birmingham-Southern College, even if Mr. Acker did graduate from that fine institution a few years after I did.

After graduating from Birmingham-Southern with memberships in Phi Beta Kappa and Omicron Delta Kappa, Bill Acker went on to study with distinction at Yale Law School. He was graduated from that internationally esteemed law school in 1952.

Since graduation from law school, Mr. Acker has practiced continuously in Birmingham. Since 1972, he has been a senior partner in the distinguished firm of Dominick, Fletcher, Yelding, Acker, Wood & Lloyd. Earlier in his career he practiced with a firm of which the Honorable Shuford Smyer was the senior partner. Mr. Smyer was Alabama's finest real estate lawyer. Mr. Smyer's tutorship continues as one of Mr. Acker's finest assets. His present senior partner, Frank Dominick, is likewise one of Alabama's finest attorneys.

Mr. Acker is admitted to practice in all of the courts of the State of Alabama, the U.S. Circuit Court of Appeals for the Fifth Circuit, and the U.S. Supreme Court. He is a member of the Birmingham, Ala., and American Bar Associations. He has practiced across a broad spectrum of the law, and has gained a reputation as being an excellent advocate.

In addition to all his other qualifications, Bill Acker is also painstakingly precise in his attention to detail, to such a degree that he personally folds and stuffs into the envelope every piece of mail he sends out. It seems that, early in his legal career, in the course of handling a particularly difficult case, Bill dictated a letter to his client. In this letter, he detailed all the weaknesses in his case and explained how it would be quite difficult for them to win.

At the same time, Bill dictated another letter to his adversary in the case, setting out all the various compelling legal arguments as to why it would be wise for the adversary to settle while he had a chance. Unfortunately, for Bill and his client, his secretary stuffed the letters in the wrong envelopes. Nobody knows, or will say, how Bill straightened the mess out—but ever since, he has personally stuffed every piece of mail that leaves his office. I am confident that his regard for detail will be an asset in performing his judicial responsibilities.

He has a reputation for donning bow ties on occasion. I am advised by competent staff that this in itself would probably not jeopardize his nomination.

Mr. Chairman, it is my belief that justice is the guardian of all liberty. I believe that we best insure justice when we insure a quality judiciary, composed of individuals of the highest integrity.

Mr. Chairman, William Acker is an example of what is known as a "lawyers lawyer." I have known him for many years.

While I served on the Supreme Court of Alabama, he appeared before that court, and I had the opportunity to witness his ability on a firsthand basis. Mr. Acker wrote excellent and scholarly briefs, and made well organized, cogent, and articulate oral arguments. From my personal observations, I can say he is exceptionally well qualified.

Based upon these observations, together with the nominee's eminent reputation within the legal community of Alabama, I am confident that he will serve with great distinction on the Federal bench, and with each case he tries, provide proof of the wisdom of this nomination.

It is with a great deal of pleasure that I recommend and wholeheartedly support the nomination of William Acker for this most important position.

Thank you, Mr. Chairman.

The **Chairman**. Thank you very much, Senator.

Mr. Acker, I want to commend you for having been recommended by Senator Denton here. Senator Denton is a new Member of the Senate. He is one of the most highly respected men we have in the Senate. He is a great patriot and able member of this committee.

Also, you have been highly endorsed here by Senator Heflin, a former member of the Supreme Court of Alabama. These two Senators have recommended you in a very fine manner. I am sure that will be of great assistance to you in the consideration of your nomination by this committee.

Now, I do not want to ask them to stay. Senator Denton, if you could stay until 3 o'clock and then at 3 we are supposed to go over and see if we can get Senator Grassley to take over from 3 to 4. I would appreciate it if you would do that.

Thank you very much, Judge Heflin.

Now, we might take all of these Senators here. They are in a hurry.

Senator Kasten, I believe you have a nomination here for a member of the Civil Rights Commission, Mr. Robert Destro of Wisconsin.

Mr. Destro, you have not testified previously, have you?

Mr. **Destro**. No, sir.

The **Chairman**. Then I will swear you in.

[Witness sworn.]

The **Chairman**. Senator Kasten, would you like to begin?

STATEMENT OF HON. BOB KASTEN, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator **Kasten**. Mr. Chairman, I am pleased to have the opportunity to introduce a constituent, Robert A. Destro, who has been nominated by the President for a vacancy on the Civil Rights Commission.

Mr. Destro is a Democrat and has been nominated to fill a Democratic seat on the Commission.

A native of Ohio, Mr. Destro graduated from Miami University in Ohio, and received his law degree from the University of California at Berkeley.

Following law school, he practiced law in Cleveland and served 2 years as a volunteer lawyer for the American Civil Liberties Union in the Cleveland area.

In 1977, Mr. Destro moved to Milwaukee to become counsel to the Catholic League for Religious and Civil Rights. He has succeeded in developing a national civil rights practice for the organization and has been responsible for the management of extensive litigation and appellate civil rights cases.

For the last several years, Mr. Destro has been an adjunct professor at Marquette University Law School teaching on the subject of constitutional rights.

Mr. Destro has published a number of articles on various subjects.

He has been appointed assistant professor at the law school at Catholic University here in Washington where he will be teaching constitutional law and first amendment rights.

So, Mr. Chairman, I am pleased to recommend Robert Destro for the committee's consideration, knowing that he is well equipped and well qualified to make a fine contribution as a member of the U.S. Civil Rights Commission.

Mr. Chairman, he is joined today by a number of members of his family, including his wife, Brenda, and his father.

I might ask that he introduce those members.

The **CHAIRMAN**. We would be pleased to have the members of your family stand.

Thank you.

Mr. **DESTRO**. Thank you.

My wife, Brenda, and my father, Anthony L. Destro, are here.

Thank you very much.

Senator **KASTEN**. Mr. Chairman, as I said, I am very pleased to recommend Robert Destro and I thank you for your consideration.

The **CHAIRMAN**. Thank you very much, Senator.

Mr. Destro, we are fortunate to have an outstanding Member of the Senate, Senator Kasten, here to recommend you and endorse you and come here to speak on your behalf.

We will excuse him unless he desires to stay. He is welcome to stay if he wishes, and we will pass on to the other Senators that have members here, and then we will come back in a few minutes.

Our next nominee is Rev. Constantine Dombalis, of Virginia.

I see Senator Harry Byrd back there.

Is Senator Warner here?

Mr. Dombalis, would you please stand.

[Nominee sworn.]

The **CHAIRMAN**. Senator Byrd, we would be pleased to hear from you.

Senator Byrd.

STATEMENT OF HON. HARRY F. BYRD, JR., A U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator **BYRD**. Thank you very much, Senator Thurmond.

I appreciate you and the committee permitting me to say a few words on behalf of Constantine Dombalis.

Father Dombalis is dean of the Saints Constantine and Helen Greek Orthodox Cathedral in Richmond, Va. He is a past president of the Richmond Area Ministers Association. He has been president of the Virginia Council of Churches. He has been very active in the community life of the city of Richmond.

I know his church well. He has invited me there on many occasions, and I appreciate the warm friendship of the congregation of

Saints Constantine and Helen Greek Orthodox Cathedral in Richmond.

I have known Constantine Dombalis for at least 25 years. I regard him as one of the finest citizens in our State. I think it is accurate to say that he is beloved by the Greek American community in our State, and I do not know of any individual who is held in higher regard by all segments of the population in the city of Richmond than is Constantine Dombalis.

I do not know that I could exaggerate in whatever I might say in regard to him, because I regard him as one of my dearest friends, as one who has done much for the city of Richmond and for the State of Virginia; and I am delighted that he has been recommended and appointed to the position of a member of the Commission on Civil Rights. I highly recommend to this committee the confirmation of Constantine Dombalis for this very important position for which he has been nominated by the President.

The CHAIRMAN. Thank you, Senator.

Senator BYRD. And I thank you for permitting me to say these few words.

The CHAIRMAN. Mr. Dombalis, you are fortunate to have one of the great men in the Senate to come here and recommend you. There is no finer man in this Senate than Harry F. Byrd, Jr. Just like his father before him, he is a great statesman and a great Senator.

We are going to excuse him now. I know he is busy and he can go on with his duties.

Senator BYRD. Thank you.

May I introduce to the committee Mrs. Dombalis?

The CHAIRMAN. Do you have any other members of your family here?

Mr. DOMBALIS. No, sir.

The CHAIRMAN. I do not believe we have any other Senators here.

If Senator Warner comes in, we will give him the opportunity to speak, too.

Senator Metzenbaum, I believe you have a statement you wish to make?

Senator METZENBAUM. Yes, I do.

The CHAIRMAN. And then I will turn the hearing over to Senator Denton to begin hearing the district judge in Alabama, William M. Acker, Jr.

STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Mr. Chairman, I come here to this meeting today indicating my concern about these appointments. But I want to make it clear that my concern about the appointments is not a reflection upon the individuals who have been appointed. My feeling is that the administration should withdraw these nominations because there is a symbolism in their appointment and in the fact that the administration is requesting and demanding that all the present Civil Rights Commissioners resign. I think that the President has to reconsider what he is doing. It is imperative to re-store faith in this Government's commitment to equal rights for all. Removing all of the members of the Civil Rights Commission and putting in a totally new group has never been done before in the history of the Civil Rights Commission. It should not be done in this instance.

It is no secret that the public, and particularly affected minority groups, doubt this administration's commitment to strong and effective civil rights enforcement. Whether it is a question of voting rights or equal educational opportunity or affirmative action or women's rights or taxpayers' support for educational institutions that discriminate, this administration has shown an amazing—an amazing—lack of sensitivity to or understanding of, the need for equal justice for all citizens.

It is no accident that the Leadership Conference on Civil Rights issued a 75-page publication called Without Justice, that documented this administration's shabby civil rights record.

This administration has systematically sought to turn back the clock on civil rights guarantees built up over the last quarter century. And, with all due respect to the Attorney General of the United States, whether he goes out to address the Urban League or the NAACP or whatever and says that this administration's record is a good one, the facts contradict his words.

Now, the crowning blow in this effort: the administration takes the unprecedented step of replacing the entire Civil Rights Commission, commissioner by commissioner. Have these men and women done something evil? Have they failed to live up to their responsibilities as public officials?

No, of course not. They are being replaced for reasons only the President can explain to the American people.

The Civil Rights Commission has always been an independent, nonpartisan agency which has given thoughtful, responsible advice to every administration about how best to promote a strong and effective civil rights enforcement. It was created to keep our Government officials honest, to be a voice for strong civil rights enforcement, no matter what the circumstances.

No President, no President up until now, has found it necessary to have his own Civil Rights Commission. No President, up until now apparently, has been afraid of the advice on civil rights enforcement that he would get from a truly independent commission.

Why is this President any different? What has this particular group of six Commissioners said or done that has so offended this President that he feels it necessary to replace them.

We have examined some 28 policy reports by the Commission that President Reagan is seeking to replace. I want to know what was so hard to swallow about what the Commission had to say in any of these reports. What advice didn't this President want to hear? Was it the Commission report on domestic violence or its handbook on how to enforce one's civil rights? Or maybe it was the Commission's study on the decline of black farming in America; or perhaps it was the Commission's study on police brutality or maybe, maybe, maybe this is getting closer to the heart of it; maybe the President did not want to hear criticism of its civil rights enforcement budget or of its turning back the clock on efforts to achieve equal educational opportunity for all; or perhaps this administration did not like the Commission's position in favor of the equal rights amendment, or of a strengthened Voting Rights Act.

The Voting Rights Act is a good example of this administration's lack of concern for civil rights in this country. For weeks, for months, the leadership conference, the House, overwhelmingly, the Senate by the number of cosponsors, indicated that we wanted an effective Voting Rights Act.

Mr. Smith sat in front of us, and I asked him one day how does the administration know that they were so right about their position. They were the only ones that were opposed to an effective Voting Rights Act related to the question of intent and the necessity to improve intent.

And then, finally, by reason of the efforts of one of the prominent Republicans in this body, the President switched signals and came on board and then took credit for the Voting Rights Act as being reenacted.

This administration ought to look back on what Senator Joseph Clark said during the 1957 debate on the establishment of the Commission that now seems prophetic indeed. He said:

> Why the opponents of this bill should object so violently to the Commission that it establishes is quite beyond me. Perhaps it is because conscientious commissioners, acting in accordance with the authority conferred upon them, might conceivably throw light into dark corners and arouse the conscience of the American people to the point where conditions which we should all be ashamed can be remedied by action.

Mr. Chairman, it is a difficult day to sit here and to talk about certain persons who are up for confirmation. I have no quarrel with them on an individual basis. I have a great quarrel with the propriety, with the lack of sensitivity, with the lack of commitment to civil rights that would cause the President of the United States to replace en bloc, the Commissioners who have been sitting and who have been providing yeoman service.

I would say to those who are appointed by the President and who are here before us today for confirmation, I respect you and I have no problem about your being appointed. But I say that you have to search your own conscience as to whether or not accepting an appointment under these circumstances is the right and proper thing to do as those ostensibly concerned about civil rights.

I thank you, Mr. Chairman.

Senator **Denton** [presiding]. Thank you, Senator Metzenbaum.

I notice the arrival of the junior Senator from Virginia, our distinguished colleague and friend, Senator Warner. I understand you want to say a few words on behalf of Reverend Dombalis.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator **Warner**. I thank you, Mr. Chairman.

As I understand it, the will of the Chair is that my statement be submitted due to a time constraint, and I will observe that request.

I have known this outstanding American for many years. I have set forth in my statement his credentials and my unqualified recommendation to you and to members of the committee on his behalf.

I submit my statement.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR JOHN W. WARNER

Thank you, Mr. Chairman, I join with my distinguished senior colleague, Senator Byrd, in introducing to the Committee a Virginian who has been honored by the President as a nominee for the Commission of Civil Rights, Father Constantine Dombalis. I am also pleased to introduce Mrs. Dombalis to the committee.

It is imperative that we give special scrutiny to the character and qualifications of those singled out for important positions of public trust.

Beyond the fact that Father Dombalis has had the good sense to make his home in Virginia, he has compiled an impressive record of service to his profession and community.

Father Dombalis was educated at Holy Cross Theological School (Hellenic College), receiving a Bachelor of Theology degree. He then went on to post graduate studies at the Episcopal Theological Seminary in Cambridge, the Harvard Divinity School, the Episcopal General Theological Seminary of New York City, and Columbia University. Father Dombalis finished his formal training in 1952. Since that time, his experience has spanned a broad array of private endeavors as well as dedicated public service to our Nation.

Throughout Father Dombalis' career, he has dedicated his life in service to others. In addition to his ministry as Dean of Sts. Constantine and Helen Greek Orthodox Cathedral in Richmond, Father Dombalis has served as President of the Virginia Council of Churches, and as the Group Leader for the White House Conference for Children and Youth. Father Dombalis is a member of the Bi-Racial Commission on Human Relations.

Father Dombalis has distinguished himself as a member of the United States Holocaust Memorial Council and the United States National Commission for UNESCO, and is a member of boards of directors too numerous to mention at this point in the record.

I have known Father Dombalis, a respected leader in his community, for many years. I have the highest respect for his professional capabilities and his ability to make decisions based on sound judgment.

Constantine Dombalis is a man in whom I have utmost confidence and one whose confirmation as a member of the Commission on Civil Rights I fully endorse.

I am confident that the Committee, in the course of its inquiry into his qualifications, likewise will develop the highest opinion of this outstanding individual.

Mr. Chairman, I thank you for giving me this opportunity.

Senator DENTON. Recognizing the demands on your time, you are excused.

Thank you.

There are two statements on behalf of Dr. Quintanilla, of Texas. They are by Senator Tower and Senator Bentsen. Both of them are detained in other conferences or committees and those statements will be included as part of the record.

[The prepared statements of Senators Tower and Bentsen follow:]

PREPARED STATEMENT OF SENATOR JOHN TOWER

Mr. Chairman. It is an honor and a distinct pleasure to introduce to you today a fellow Texan nominated by the President of the United States to serve as a member of the U.S. Commission on Civil Rights. Dr. Guadalupe Quintanilla is an educator, an author, an active member of both her profession and the community in Texas and in Houston and the recipient of numerous awards signifying her commitment and dedication to the goal of strengthening community understanding through elimination of discrimination.

Having served as an administrator in higher education, as well as having been a college professor and an educational consultant, Dr. Quintanilla has centered her career on the development of materials and courses designed to bridge the language gap between two communities. Her record of achievement in bilingual education is based on the fact that she is both academically sound and has a practical understanding of the difficulties of eliminating a language barrier. Particularly, her experience in educating police officers in the Hispanic culture and the Spanish language distinguishes her as an individual ready to find the beginning of a real solution to an historical problem. Further, her articles on the history and the culture of Hispanics designed for use in training bilingual education teachers have been of invaluable use in inculcating not just the technical aspects of language training, but also in presenting the broader perspective necessary for a more complete understanding of the unique and valuable role Hispanics play in our own culture.

Mr. Chairman, I recommend without reservation that Dr. Quintanilla be confirmed as a member of the Commission. Her term of service will be, I am certain, one marked by the same level of distinction she has achieved in all of her previous endeavors.

STATEMENT OF SENATOR LLOYD BENTSEN

Mr. Chairman and members of the committee, I appreciate the opportunity to submit this statement for the record on behalf of the nomination of Dr. Guadalupe Quintanilla to the Civil Rights Commission. I am especially pleased with this nomination because it comes at a time when this country's commitment to protecting Civil Rights for all Americans is being seriously challenged. I also am pleased that the committee is conducting these hearings because now more than ever it is important for the committee to ensure that the nominees to this important Commission are dedicated to the protection of civil rights for all citizens.

I am sure that, at the conclusion of these hearings, the committee will concur with my assessment that Dr. Quintanilla is well qualified to serve on the Civil Rights Commission. She received her bachelor of science degree from Pan American University in 1969 and her masters and doctorate degrees from the University of Houston in 1971 and 1976, respectively. She has distinguished herself in the education profession not only among her academic peers but also across the State of Texas. She received the teaching excellence award from the University of Houston in 1973; the outstanding American of Mexican descent award from the center for public school ethnic studies, University of Texas in 1973: The Lulac distinguished citizen award for academic excellence in 1974; the YMCA excellence in teaching award for 1971, 1973, 1974 and 1975; the outstanding educator award from the Universidad De Guadalajara in 1976: the outstanding citizen award by the city of Houston, Texas, in 1976; a diploma de reconocimiento for contributions to education from the Ministerio De Education De Guadalajara in 1977; as well as a number of acknowledgements and commendation from the State of Texas. She has published numerous books and articles on a wide range of topics with special emphasis on bilingual education.

She is a superior academician and civic leader. She has an impressive record of achievement and will be a dedicated member of the Civil Rights Commission. She has demonstrated an unusual commitment to civil rights and I urge the members of this committee to approve her nomination.

Once again, I appreciate the opportunity to submit this statement.

TESTIMONY OF WILLIAM M. ACKER JR., NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ALABAMA

Senator **DENTON**. I have noticed the arrival of Senator Leahy, and I welcome him to these proceedings.

We will have questions now for Mr. William M. Acker, Jr., of Alabama, for the position of U.S. district judge for the Northern District of Alabama.

Mr. Acker has already been sworn in.

Mr. Acker, you have been a practicing attorney since 1952. Now, you have been nominated for the position of U.S. district judge for the Northern District of Alabama. What would you see as the most rewarding aspect of serving in that capacity?

Mr. **ACKER**. Senator, a man who has practiced law in a courtroom for 30 years hates to leave it. I see this as a new, a different, and a higher calling. Of course, the calling was issued by you, Senator. Very difficult to turn you down on something this important to the Northern District of Alabama, to my fellow lawyers, to the people that live there and litigate there.

It is going to be a transition for me, one that I think I can accomplish. It will be different, as I say, but rewarding, I think, in many, many ways.

Senator DENTON. Mr. Acker, would you please describe the arrangements you have made to dissolve the financial interest in your law firm?

Mr. ACKER. Senator, the arrangements in my law firm are a matter of contract with the firm. We are a P.A. and I am an employee of that organization with certain defined contractual rights.

Unfortunately, in some respects for me, economically, a person voluntarily withdrawing from the firm does not get what one might if he died or retired. This is one of the terms of that contract; that a voluntary withdrawal entitles me to a specific sum and to a participation in the profits of the firm for the fiscal year which will end January 31, 1983, based on my percentage of interest in those profits for that portion of the year for which I am still a member of the firm.

For instance, if I withdraw from the firm after 6 months, I would be entitled to one-half of what I would otherwise have been entitled to and my arrangement in that regard is cut and dried and it will be terminated automatically as far as any participation in decisionmaking the minute I walk out the door. But I will participate in the distribution, if any, made on January 31, 1983.

Senator DENTON. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues which are not properly within the scope of their authority. What does this phrase, "judicial activisim" mean to you, Mr. Acker, and I ask you to be as brief as possible in your response.

Mr. ACKER. Well, my idea of judicial activism would be a judge whose attitude would be he is on Sinai, he is the legislature and the Supreme Court, and he is handing down the tablets. My view is that I would prefer to take the tablets as handed down and interpret them under the specific circumstances.

Senator DENTON. And my last question, Mr. Acker: I believe judicial temperament to be a prerequisite for a Federal judge.

Would you offer your thoughts on that?

Mr. ACKER. I certainly would agree with that statement. I am sure that some of my brothers who have been hard fighters with me in the courtroom might have some doubts about that judicial temperament. I hope I might allay any of the fears they may have when I change places and assume the bench.

Senator DENTON. All right.

Those are all my questions, and I would offer Senator Leahy the opportunity now.

Senator LEAHY. I have no questions.

Senator DENTON. Thank you, Senator Leahy.

Thank you, Mr. Acker. Your biography will be included in the record. You may be excused.

TESTIMONY OF ROBERT A. DESTRO, CONSTANTINE NICHOLAS DOMBALIS, AND MARIA GUADALUPE QUINTANILLA, NOMINEES, CIVIL RIGHTS COMMISSION

Senator DENTON. We will now ask all three nominees for the Civil Rights Commission to come forward: Prof. Robert A. Destro of Wisconsin; Rev. Constantine Dombalis of Virginia; and Dr. Guadalupe Quintanilla of Texas.

Dr. Quintanilla, you are the only one that has not been sworn in.

[Dr. Quintanilla sworn.]

Senator DENTON. Would you like to introduce any family members?

Dr. QUINTANILLA. No, sir.

Senator DENTON. Mr. Destro, I understand you were the general counsel for the Catholic League for Religious and Civil Rights during the period 1977, until February of this year.

What were your duties while serving in this capacity?

Mr. DESTRO. Well, Senator, my duties upon commencing my job as the general counsel of the Catholic League were, essentially, to begin a legal services organization for the league. We really did not have very many pending cases in the office and my first duty was to get in touch with people around the country. It was the national headquarters of the office, and I was the only lawyer at the time. It was my job to get in touch with people and say that we were open for business.

I reported to a legal advisory committee, which was the body which approved and had final word on what cases we would be involved in. I reported also to the board of directors which determined the general areas in which the league's litigation and legal services arm would become active.

With the committee's permission, I have a listing of some of the areas in which the league has been involved during the time of my tenure. It recaps some of the types of requests for assistance that we received from around the country over those years; and every one of those listed, even the ones that are listed as general subject matter categories, were dealt with in one form or another, whether by litigation, settlement, or consultation, by a member of our staff, either by me or later, a year later when we had an associate join, by the associate.

I think this should give the committee some idea of the kinds of subject matter we dealt with.

We were, generally speaking, a national organization. We did very little around the local area, around Milwaukee. Most of our cases were in other places.

That pretty much recaps my litigation duties. I had some writing duties as well.

Senator DENTON. Would you be offering that statistical data for inclusion in the record?

Mr. DESTRO. Yes, sir. I have it here.

Senator DENTON. Without objection, it will be entered into the record.

[The following was received for the record:]

Office of General Counsel, Catholic League for Religious and Civil Rights, Activity Summary, Requests for Assistance, November 1, 1977 to February 28, 1982

(By subject matter)

[All numbers are approximate]

Religious discrimination	23
Employment discrimination	39
Free speech/association	12
Establishment clause	11
Parental rights	8
Education	18
Abortion:	
Regulation	33
Funding	17
Death issues	2
Antidefamation	2
Tax issues:	
Deductions	4
Exemptions	3
Credits	2
Other	4

Other issues include: Marital/Community Property, Sexual Preference, Fairness Doctrine (F.C.C.), Trespass/Demonstrations, Unemployment Compensation, Insurance Coverage, Rights of Women, Rights of Handicapped, Race Relations, Exclusionary Zoning, and Immigration Law/Policy.

Senator DENTON. Mr. Destro, there has been some concern relative to statements you made in 1978 while testifying before the Senate Subcommittee on the Constitution.

The subcommittee at that time was chaired by Senator Birch Bayh, and the testimony was in your capacity as general counsel to the Catholic League for Religious and Civil Rights.

In order to clarify the record, I would like to quote from certain portions of that hearing transcript. These are your words:

> We are a young organization but we are day-to-day becoming more and more aware that religious discrimination is rampant in this country. It is very subtle. So it is discrimination against ethnic minorities. Race and sex discrimination and against nonwhite minorities are obvious, as you pointed out yourself. Those are things one can readily see.
>
> Religious discrimination is probably the most subtle of any of the discriminations.

I continue with the quote:

> The Commission, in short, then, should report its findings and should go into these problems. They have not done so. Its credibility is based on its impartiality and its good scholarship and it should be a source of complete information for all groups which are interested, for scholars and for Congress.

I continue the quote in another paragraph:

> It is not performing these reporting functions. If it were to go out of existence today, it would not be missed. Its functions, as I have seen so far, could well be carried on by interest groups such as the NAACP, the National Organization for Women, and any of the other specific interest groups.

Senator Birch Bayh later asked you as follows, in quotations, from Senator Bayh:

> As I understand it, you are saying this; you are not saying that the efforts to deal with the more obvious problems of discrimination directed at various minority groups or problems encountered by women are wrong. You are saying that that effort is well based and a matter of legitimate concern. You feel, however, that there are other areas, such as religious and ethnic background that should also be included? Is that correct?

He asked you that, and your response was: "Yes, I would say that."

Now, Mr. Destro, do you, in 1982, still share those concerns of discrimination as expressed in 1978 and would you care to elaborate on the statements that were made at that time?

Mr. **Destro**. Yes, Senator.

I would like to note for the record at the outset that if there has been any misinterpretation of my words with respect to the Commission and my criticism of it, I would apologize for not being any more clear.

What I was saying at the time, and what I said during my testimony and what I believe now, is that the Civil Rights Commission has a very, very important role to play in bringing to the attention of the public, to the attention of this Congress and of the President, problems related to the civil rights of all Americans.

At the time I testified in 1978, I was quite disappointed in the Civil Rights Commission because, as a civil rights attorney who was just getting started in the area of religious and ethnic discrimination, there was nothing at all that I could draw upon as a practicing attorney from the Civil Rights Commission which would have helped me deal with those problems. There were certainly problems which religious believers and people of nonracial ethnic groups face. The problems that they face are dealt with by the civil rights laws in very much the same manner as other problems in the civil rights area are dealt with by practicing attorneys.

But my view of the Civil Rights Commission is that it should not be picking or choosing. When I did the research for that testimony, when I tried to find even one report on religion or ethnicity, up until that time, there was not anything. I submitted a chart to that effect with zeros down the columns with religion and ethnic concerns.

It was about a year afterward that the Commission held its first consultation on the problems of European Americans, and I understand from reading one of the Commission's recent reports that it is about to issue a report which it has titled "Religious Discrimination: A Neglected Issue."

In that respect, I am happy to see the change. I considered it very unfortunate at the time that I had to be so hard on the Commission, but I felt that I had to get their attention some way, and I think I succeeded in doing that.

I applaud them for coming up and starting to do a little research on what I consider to be a very neglected area.

Senator **Denton**. Thank you.

Later in the 1978 hearing, the following dialog took place, and this is from Senator Bayh:

> As I understand it, your concern is basically on the weaknesses you feel exist in the 1974 Report about Abortions.

You replied:

> No, Sir.

Senator Bayh then said:

> Then you are concerned about all the studies they have done except those on voting rights, employment or housing as well as—excuse me—Then you are con-

> cerned about all of the studies they have done, even those on voting rights, employment and housing as well.

Your response was:

> I think most of the conclusions that have been reached by the Commission are unassailable. I do not think I would argue with them. What I have a problem with is the way they do them and some of the conclusions they reach. I believe sometimes they are unsupportable but many of them are fine.

From what you say now, Mr. Destro, and examining your previous testimony as quoted above, as I understand it, you were not then finding fault with the subjects of the Civil Rights Commission's 1974 report but in the scholarship of the report; is that correct?

Mr. DESTRO. Yes, sir, and also, on the report with respect to abortion, I really feel very strongly that the Congress was correct in instructing the Commission not to get involved in the area. I do not feel that abortion is an area that the Commission should be involved in. It is one of very heated public debate and I think that it would take time away from the Commission's work while it is being debated fully here in Congess and in the courts. I do not think the Commission can add much to it, and I think it did much in that report to fuel criticism which it really did not need.

Senator DENTON. Then you feel that the Civil Rights Commission should not be involved in making recommendations in areas such as abortion?

Mr. DESTRO. On the abortion issue specifically, yes, I am very strongly opposed to the Commission even getting involved in the decision.

Senator DENTON. Your opinion would appear to be corroborated by 42 CFR 1975C, which says:

> Nothing in this Act or any other Act shall be construed as allowing the Commission, its advisors or any person under its supervision or control to appraise or study and collect information about laws and policies of the Federal Government or any other governmental authority in the United States with respect to abortion.

I made that remark for the record.

My final question, before turning to Senator Leahy, Mr. Destro, I am sure you agree with the need for an effective Commission on Civil Rights, and as a Commissioner, you will have an excellent opportunity to influence policy.

What recommendations would you offer now which would make the Commission operate more efficiently in the future?

Mr. DESTRO. Referring back to some of my previous testimony, I think it is very important that the Civil Rights Commission not only be concerned with the rights of all individuals who suffer from discrimination in our society, but also not even have the appearance of neglecting anyone.

At the time I testified in 1978, this was not only an appearance. It was clear that the Commission had been neglecting two very important civil rights issues. In fact, the religious discrimination issue was one which I think people often forget, that many people came to this country to flee religious persecution and it seems to me very sad that the Commission did not see it within its perview to even broaden out its concern when it was doing reports to cover those other issues.

One does not really need to reallocate a lot of resources when you do a report to include the other subgroups of civil rights concerns in it.

I would like to see the Commission broaden out its perspective a little more. I am going to be happy, if I am finally appointed, to give the benefit of my own experience in these areas, and I hope to cooperate very closely with the groups who I believe, unfortunately, may have misunderstood what I was trying to say about the Commission in my previous testimony.

Senator DENTON. Thank you, Mr. Destro, and with the previously received indulgence of Senator Leahy, having concluded my questions, I will turn to Dr. Quintanilla and Reverend Dombalis and ask the following question, which is really in two parts.

The mandate of the Civil Rights Commission is that it will hold public hearings and collect and study information on discrimination or equal protection of the laws because of race, color, religion, sex, age, handicap, national origin, or in the administration of justice. That is a quote.

My question, in two parts is, and I address it to both of you with Dr. Quintanilla first:

First, would you support the mandate of the Commission; and, second, what recommendations do you have that might enhance the effectiveness of the Commission?

Dr. QUINTANILLA. Definitely yes to part I; I do support the mandate of the Commission, and I basically would have at this point two recommendations.

One, that it is my understanding that the Commission is reauthorized in periods of 5 years or at least it has been in the last three sessions; that the reauthorization period be extended to perhaps 10-year intervals instead of 2 or 3 or 5. And the other one, that a closer look be taken at the reallocation of budget and resources and personnel to have a more equitable distribution across the Nation.

Senator DENTON. Thank you, Dr. Quintanilla.

Father Dombalis?

Mr. DOMBALIS. To the first question, my answer, of course, would be, yes. In response to your second question, I think all of us bring attributes where we have strengths. Mine would be in the area of communication. I would hope to contribute to the Commission a deepening of exchange, of knowledge, amongst the peoples of our great land and in doing so break down the barriers of discrimination and heighten and support the rights and the dignity of each American citizen.

Senator DENTON. Thank you.

I now turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I had earlier passed over the time for an opening statement because I knew Mr. Acker's concern of time. So I would like now to make my opening statement on this prior to my questions, if that is OK.

Senator DENTON. Certainly, sir.

STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Few institutions established by Congress have done more to promote the Constitution as a reality for every single person living in the United States than the Civil Rights Commission. The reports which the Commission has submitted over the years to the President and the Congress have been bulletins to our conscience, really, from a body that has remained true to the charge set for it in 1957. The body has been remarkably impervious to the changes in political outlook that have accompanied all the different administrations since that date. The Civil Rights Commission has been steadfast; it has been effective. I think the American people have been richer for its presence.

And for these reasons alone, I think that our committee has to look closely at the nominations for membership, no matter who those people are, even in the best of times for civil rights. This is because a timeframe for liberties is a long one and even in the best time we cannot be complacent about the civil rights of our citizens.

I do not think these are the best of times, despite his protest to the contrary. The administration has given clear signals that civil rights are not a high priority—I make that statement sadly and with a heavy heart—and in some cases retreated from the policies of past administrations, policies of both Republican and Democratic administrations.

It is disturbing, for example, to see the Justice Department reversing positions it took in the lower courts in behalf of plaintiffs in cases involving the Voting Rights Act and reversing those positions when those cases were appealed to the Supreme Court. It is equally upsetting to see the Justice Department asking a court to allow reconsideration of the school desegregation basing plan already in effect. I am sure that the Attorney General would argue that it is the same as it has always been. It is only those goals that are at issue. But that argument does little to change results.

Those struggling to be equal in our society are fighting a losing battle and they know it. They fear their civil rights are low on the Reagan administration's agenda. Unfortunately, the President has done very little to ease those fears. So in that kind of atmosphere, it is doubly incumbent upon us to look at any nominee to the Civil Rights Commission.

Let me add very quickly that no nominee that comes before this committee will be judged by the views of the President but rather on his or her own qualifications to serve. The civil rights record of the present administration may sharpen our inquiry, but an equally strong duty is to hear what you have to say and form our judgments afterwards.

Quite apart from any individual nominees, I am concerned to see that the President has seen fit to replace all of the members of the Commission, all of the members of the Commission. Now, that is a step that is unprecedented in the Commission's history. No Republican, no Democratic President has ever taken that step, and an appeal to continuity of purpose, must rise above both politics, certainly above partisan politics, and has always done so up to the present administration, both Republican and Democrat.

Few actions by the President have caused more concern in the civil rights area than the downgrading of civil rights as a priority. Couple this with the recent order by OMB to eliminate 33 positions in the administration. I think a lot of people have reason to be concerned.

I do not expect the nominees, Mr. Chairman, to speak for the administration in this matter. But the replacement of the entire membership of the Commission places added emphasis on this committee's duty to inquire, to ask each of you now before us what you believe the mission of the civil rights body is, how your views with civil rights fit in with that mission.

Mr. Destro, Senator Denton has already asked you some questions about your testimony before. You appeared previously before Congress on the subject of the Civil Rights Commission. You appeared before the House authorization hearing in 1978. He spoke to you of some questions in a Senate hearing with Senator Bayh.

Senator MATHIAS [presiding]. I am sorry to interrupt, but I have to ask a procedural question.

I have just been called to the floor in connection with an amendment that has just been raised there. I understand that you have about 20 or 30 minutes of questioning. I am wondering if you think that you could proceed without my aid and support for those 20 or 30 minutes.

Senator LEAHY. Only with trepidation, Mr. Chairman.

Senator MATHIAS. Trepidation might be on the part of the country. But I am wondering whether you think you can handle this alone.

Senator LEAHY. So long as I know you are nearby in case I falter.

Senator MATHIAS. If I have not returned from the floor by the time you are finished, then the committee will stand in recess until either the chairman of the full committee or I get back.

Senator LEAHY. Getting back to what I was saying, Mr. Destro, your views give us concern. Those views give us a duty to inquire and I am sure you agree.

I think, though, that we must look not only at past views but what your individual views now might be, what the issues are that you believe should be raised in the future and so with that in mind, let me go to a couple of things.

In your prepared statement before the House Judiciary Subcommittee in 1978, you said:

> Unless substantial changes are made in the scholarship and methodology by which the Civil Rights Commission deals with the weighty problems entrusted to its care, unless the Commission ceases to function as a governmentally funded lobby group, we must go on record in opposition to the extension of the Commission.

Now, which reports commissioned to the President and the Congress caused you to call the Commission a governmentally funded lobby group?

Mr. DESTRO. I think the Commission's report on Constitutional Aspects of Child Bearing. I saw that as a very badly done report. I still consider it to be a very badly done report. I am very pleased and supported very strongly the proposed legislation back in 1978 to restrict the Commission's position—taking positions—on abortion. It, in my view, was lobbying very heavily at that time and I really do not approve of that type of lobbying.

Senator LEAHY. And that is what you meant when you said unless the Government ceases to act as a governmentally funded lobby group?

Mr. DESTRO. Yes, sir.

Senator LEAHY. So you feel that the Commission was a governmentally funded lobby group lobbying in favor of abortion?

Mr. DESTRO. Yes, sir.

Senator LEAHY. Do you still feel that the Commission is a governmentally funded lobby group in favor of abortion?

Mr. DESTRO. They really have not done anything since that time. When it comes to pure civil rights matters, I think that it is part of their charter to lobby for civil rights, and I wholeheartedly approve of that function.

Senator LEAHY. So what you are saying is that even though you said unless the Commission ceases to function as a governmentally funded lobby group, what you are saying is that unless they cease to function as a governmentally funded lobby group in those areas you object to?

Mr. DESTRO. Yes, sir.

Senator LEAHY. And it is perfectly OK to be a governmentally funded lobby group in those areas you agree with?

Mr. DESTRO. No, I would not characterize it that way.

Senator LEAHY. How would you characterize it?

Mr. DESTRO. The Commission's mandate speaks in terms of race, sex, national origin, religion, handicap, and age. I may have left out a category; I don't recall—administration of justice, I believe.

Senator LEAHY. Well, in your——

Mr. DESTRO. Those are areas that the Congress set up as the areas in which the Civil Rights Commission is to advise and opine. Those are well within its mandate. For it to be an effective and strong lobby or advocate, if you will, for civil rights in the areas in which Congress has set out a mandate, there is absolutely nothing wrong, in my view. I have no problem with the Commission's reports on the areas of civil rights concerns that it has reported on. However, in that particular report, many very important civil rights issues were glossed over, in my view. People were characterized as—people who share a prolife position, like I do—were characterized in effect as "those people." Even prolifers, in my view, have civil rights. They have, for example, the right not to be discriminated against in employment. I have handled a number of cases like that.

So when I say the Commission should not be a lobby group, I was talking about abortion and abortion funding at that time. There were a lot of people that were very, very disappointed that the Federal Government was, through the Civil Rights Commission, lobbying the Congress to use their tax money and was using their tax money to support things they do not believe in.

The Supreme Court has held on a number of occasions that one should really not be compelled to pay into types of political activity that one does not believe in, and that is really what I was talking about at that time.

If it looks like it was a broader criticism than that, I am sorry for that simplification.

Senator **Leahy**. You are not saying that the Commission has no lobbying authority?

Mr. **Destro**. No, sir. It is supposed to be an advocate and that is what its charter sets out and I am sure it will continue to do that.

Senator **Leahy**. In response to Admiral Denton's question, is it my understanding that you said that the Commission should not be picking and choosing?

Mr. **Destro**. I think what I mean by that is the Commission—whenever you are going to do a report on anything, you have to pick and choose what you are going to do. But generally, the Commission's reports are on discrimination in specific areas——

Senator **Leahy**. Maybe I could narrow that a little more.

Considering the fact that OMB has recommended slashing rather considerably their resources, resources that they have to go into civil rights issues, they, obviously, still have to pick and choose among competing priorities.

Many of us feel they will not be able to carry out the mandate they have under the law with these limited resources.

Assuming there are competing priorities, can you tell me what you feel are the most pressing areas of discrimination?

Mr. **Destro**. I think that it is—from the perspective of individuals——

Senator **Leahy**. From the perspective of a nominee to the Civil Rights Commission, what do you see as the most pressing areas of discrimination?

Mr. **Destro**. I think that the most pressing area is one of the areas very much of concern to me at this point—is discrimination across the board in the area of immigration. I suspect very strongly that there have been for a long time, going back many, many years, unspoken forms of racial, ethnic, and religious discrimination in the area of immigration law.

Being of Italian-American descent myself, and listening to the stories that my grandparents told about what happened to them when they came over, and looking into the way quotas are set up, and having some contact with the more recent immigration influxes into the South, the Haitian and Cuban boat people—I know that is before the Congress right now, but I would like to see the Civil Rights Commission look into that. So when you say "pick and choose" and how are you going to reallocate the resources, when you are looking at discrimination in a systematic form, you look at discrimination in all of its manifestations, and really that was the crux of my criticism of the Commission in my prior testimony.

When it did a report, for example, on the movie industry, it recognized that there were certain ethnic stereotypes which are rampant in the movie industry, especially against Italian Americans. But there is nothing in the report that goes beyond that one sentence, and that is the kind of thing I mean when I say expanding the view—it does not mean ignoring what it did before. That is all well done. It is just expanding it to include others.

Senator **Leahy**. I just want to make sure I understand what you are listing as priorities. You are saying then that immigration is a No. 1 area that the Civil Rights Commission should be looking into now?

Mr. **Destro**. Is one of the main issues I think it ought to be looking into now.

Senator **Leahy**. What about another main issue, because I think you see this as a legitimate area of questioning.

If we have limited resources—obviously we cannot look into all the areas. The Commission will not be able to look into all of the issues it would like. If immigration is one area, what is another?

Mr. **Destro**. I think another area of very important concern would be in light of the recent demise of the equal rights amendment, to see how the laws are being enforced and whether the rejection is interpreted as a fallback from the Nation's commitment to equal employment and opportunities for women. I would like to see the Commission take a look at what happened and why it happened and keep an eye on employment opportunities and equal opportunities for women.

Senator **Leahy**. Would you have preferred to see the equal rights amendment ratified?

Mr. **Destro**. I would prefer to see an equal rights amendment in the Constitution; yes, sir.

Senator **Leahy**. Go ahead.

What would be another area of major concern?

Mr. **Destro**. I would like to see—in light of the recent amendments to the Voting Rights Act, and now after the census, I think it would be very interesting and a very fruitful study to take a look in light of the very large controversy, whether one uses an intent test or effects test in voting to see how the redistricting and how the Voting Rights Act is working in practice. It is going to take a couple of elections before you see that, but I think it is an area that the Commission should start to farm out to the local advisory committees and have them report back on how the elections are going, especially in targeted districts where there has been redistricting by Federal district courts or State legislatures to try to improve minority representation in State and Federal legislatures.

Senator **Leahy**. In 1978, you criticized the fact that the Commission took advocacy positions and you felt they should have given a more balanced view on all sides of the question and you said the Commission "should be an advisory body, not an advocacy body." Do you mean that totally or as strongly?

Let me give you a hypothetical. They have a report this year on fair housing in America. Should they give equal weight to the views of those that think that segregated housing should be legal? Where do they advocate and where do they advise?

Mr. **Destro**. What I was referring to at that point was, in my training as a lawyer, one always needs to differentiate between one's advisory role and one's advocacy role; and when one is advising with respect to your fair housing example, I think it is very, very important that the Commission make it clear when it is engaging in discussion of what the relevant facts are, and make it also clear where its opinion starts as opposed to those facts and drawing on those facts.

I think one becomes a much more effective advocate if one draws on a fairly good set of facts and uses them well. When I say that—it is not helpful, at least in my view, to mix those two functions. Both functions are fine and, in answer to your direct question with respect to, "do you give equally appropriate hearing to the views of housing segregationists," I cannot imagine that the Civil Rights Commission would do that. I think those views are fairly well known anyway, and when it comes to issuing a report on housing discrimination, the important thing to know is how it is happening and where it is happening and how often it is happening and what kind of mechanisms have failed to stop it from happening. Once you have identified all of those in your report, you then move on to the next section in which you say, given all these facts, here is how we would advise and advocate the changing of the law. I think that can be done very effectively if the Commission can get in here and in at the administration on the ground level when the laws are being drafted and really not wait. I think if a problem can be anticipated, I think it is much better to address it as quickly as possible.

Senator LEAHY. You said in 1978—you referred to the 238-page volume entitled "Sex Bias" in the United States Code, which the Commission issued as a report.

You referred to this effort as a serious misallocation of resources. Do you still feel that way?

Mr. DESTRO. No, sir, I do not, especially in light of the demise of the equal rights amendment. I think it is a shame that—I think that somewhat—let me start over.

I think it is a shame that I used that strong a term. I think it is very important that one identify any places where Government is officially advocating discrimination. But my initial concern, and my very strong concern at that time, was that although the Commission was looking through the books to find instances in which the Government was using, in some parts, sexist language, that it was totally ignoring two other areas where people were being actively discriminated against.

From the perspective of the individual who is on the receiving end of the discrimination, it hurts very badly and when that is compounded by a seeming lack of concern by a very important Government agency, I think it makes it hurt worse.

Senator LEAHY. You testified that if the Commission would go out of existence, you believe its function would be taken up by groups such as the NAACP and the American Indian Movement, the Women's Movement and other interested groups. Let me make sure I fully understand.

Do you still feel that way?

Mr. DESTRO. As a practical matter, that is probably true. But as a—again, as a practical matter, I do not think anyone could do it as effectively as the Commission does. It has a specific governmental function and I think it has got the resources—or at least it will hopefully continue to have the resources——

Senator LEAHY. Some.

It is an appropriate governmental function?

Mr. DESTRO. Yes, I think, completely.

Senator LEAHY. Now, explain the phrase to me used of governmentally approved minorities, which you say are women, blacks, Native Americans, Asians, and other persons of non-Caucasian heritage.

Mr. **Destro**. The derivation of that term is essentially—took the chart, if you could refer to the chart that appeared with my testimony back in 1978[1]—those were really the only minority groups that the Civil Rights Commission had ever issued any reports on, and it appears to one who is working as a civil rights advocate in areas that the Civil Rights Commission has not attempted to cast its attention, that those are the only areas that the Civil Rights Commission takes seriously. Those are the only ones approved for its concern and rather than give any implication that it was a derogatory or pejorative term, I want to emphasize that the phrase was really more or less the minority groups which are approved for Civil Rights Commission action. I think if you look at that chart, you will see that the Commission had done absolutely nothing to look at the rights of individuals who are discriminated against on the basis of religion and national origin.

Senator **Leahy**. I do not want the rest of the panel to think that as a form of discrimination we Italians speak to each other; we Italian Americans. So I will go on and ask a couple of other questions of the other panel members.

What changes, if any, would you like to see in the Commission's direction in the future, and are there any reports that the Commission has issued in the past that you find either inappropriate or beyond the scope of authority?

Doctor, would you like to start?

Dr. **Quintanilla**. To answer both questions briefly, one, in terms of change for the Commission, I really would need to learn quite a lot more and have relevant information in front of me before I can express an intelligent answer on the direction the Commission should or should not take.

On you second question, I have read some of the reports. I think I have read almost all of the ones that pertain to the Southwest region and I found them to be appropriate.

Senator **Leahy**. Thank you.

Mr. Dombalis?

Mr. **Dombalis**. Would you restate that question again?

Senator **Leahy**. Basically two:

What changes would you like to see in the Commission's efforts in the future, if any, and are there any reports that the Commission issued in the past that you find either inappropriate or beyond the scope of its statutory mandate; sort of a summary of some of the questions I was asking Mr. Destro before.

Mr. **Dombalis**. My knowledge of the Commission, its actions in the past, has not been an indepth knowledge of the workings of the Commission, but from my readings and from my associations with members of the Commission, I would have no objection and have had no objection and I fully support the direction in which the Commission has taken in the past and currently.

Senator **Leahy**. I am sorry; I did not hear you.

Mr. **Dombalis**. I have no objection to the direction the Commission has taken in the past.

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[1] The chart appears as exhibit No. 38 to testimony of Robert A. Destro on S. 2300, Civil Rights Commission Authorization Act of 1978 at page 269.

Now, as to what I will recommend for the future—this is your second question?

Senator **Leahy**. Yes.

Mr. **Dombalis**. There is a great subtlety in discrimination that I find existing in our land today . It is not the obtuse discrimination we have known in the past. I think this is an area in which we need to reexamine the workings of the Commission.

There is, shall I say, on the surface acceptance of the civil rights. My interest would be to seek to break down the barriers and to interweave the people or peoples of America so that civil rights becomes not only just a matter on the surface but one of depth and of the heart, of course.

Senator **Leahy**. On Monday, the Justice Department asked a Federal appeals court to allow reconsideration of the school desegregation busing plan in Baton Rouge, La. The reason is that the Attorney General feels that the plan is causing white families to flee from the system. It is also the first time that the administration has asked the court to restrict a busing plan that is already in effect.

Would you comment on the Department's position on the use of busing as one of the tools to end school desegregation?

Mr. Destro, why don't I start with you?

Mr. **Destro**. Without having looked at the Justice Department's papers, I would say as a civil rights attorney myself who has represented clients in court, it is always important to me to see whether the remedy we have asked for is working. I think it is appropriate for any decree, any remedial or equitable decree that comes out in the civil rights area, to always be reviewed to see if it is working.

As far as busing specifically goes, I would just say I consider that it is one of any number of acceptable remedies in the civil rights desegregation context. Keeping in mind, however, that what the concern of the Supreme Court in 1954 in *Brown* was was that the systems, the dual school systems, be dismantled with all deliberate speed. And if, for any reason, and that includes a Federal court decree, we see the re-creation of the dual school system, we certainly are obligated under *Brown* to go back and take a look and see that that is not what we are doing again. We cannot afford to have another generation of children growing up seeing these racial barriers in their schools. But I think it is always appropriate to review what has gone on in the past to make sure that the ultimate aim, which is the breakdown of that dual system, is being served.

Senator **Leahy**. Of course, they are doing more than just asking for review. They are asking for a withdrawal.

Mr. **Destro**. I have not seen the papers.

Senator **Leahy**. Doctor, how do you feel about that?

Dr. **Quintanilla**. I have not seen the papers either, obviously, but I believe that children should have the opportunity to grow in an integrated environment and I also believe that busing is a term that is misunderstood. It is only 7 percent of the children who are bused that are so for integration reasons and if in fact it is one of the remedies that is working, I will be in favor of it. At this particular point I think that we need to, however, look at other alternatives for effective integration of the school system.

Senator **Leahy**. Reverend.

Mr. **Dombalis**. Senator, I believe that the previous two speakers have expressed areas of my concern. Certainly there is a great, sensitive need that bothers and occupies our thoughts. We all are concerned that here in America, that our—the excellence of education be available to all our children, not just to some, and busing sought to offer this opportunity. We see, though, that this remedy has shortcomings. I would hope there would be an even more significant or more innovative way that we could create what we are all seeking.

Senator **Leahy**. Let me ask you another question. Bills have been introduced in Congress during this session. These bills are trying to alter the effect of certain Supreme Court decisions, not to change the Constitution but rather to remove or limit jurisdiction of Federal courts in areas like busing or school prayer or abortion. Do you feel that we should be doing this in substantive constitutional law? Do you have any feelings on that?

Mr. Dombalis.

Mr. **Dombalis**. Only perhaps going back to history, to what Thomas Jefferson said. What the people cannot do well, themselves, only then should they receive the help of the Government. I think this would respond to your question.

Senator **Leahy**. I am not sure I understand your answer. Are you saying what we should do, if we are unwilling or unable to amend the Constitution to change certain Supreme Court decisions, then we should go and pass laws simply to say that the Federal courts will not have jurisdiction even to look into those issues?

Mr. **Dombalis**. I am having difficulty understanding you.

Senator **Leahy**. Let me back up. The Supreme Court has made constitutional rulings in a number of areas, school prayer, school busing, abortion and others. Now such a Supreme Court decision can be overturned if we want to amend the Constitution, something rarely done in this country. Another effort has been made simply to say that—to have the Congress in effect say we do not like the decisions and so we will remove the jurisdiction of the Court to have—remove or limit their jurisdiction in areas of busing or school or abortion or anything else that we want to go into.

Do you think that is a good way for the Congress to move? In other words, not change the Constitution but simply change jurisdiction. Do you see any——

Mr. **Dombalis**. Be more specific. You must be more specific.

Senator **Leahy**. I find you have to be more specific and say do you agree with the trends presently before the Congress to limit the jurisdiction of the Federal courts to hear cases in areas like busing, school prayer, abortion? Do you see, with the Supreme Court limiting their jurisdiction—I mean the Congress limiting——

Mr. **Dombalis**. The lower court?

Senator **Leahy**. Yes.

Mr. **Dombalis**. I think at this time I will have to give the matter more thorough study before I can respond, sir.

Senator **Leahy**. Thank you.

Dr. Quintanilla.

Dr. **Quintanilla**. I understand the issue to be a very complicated one and not being a lawyer, I decline to answer.

Senator **Leahy**. All right.

Professor Destro.

Mr. **Destro**. I think that one has to distinguish in this area two questions. One is whether Congress has the power. I do not think—at least there is no question in my mind that Congress has the power to do that.

Senator **Leahy**. You feel it does have the power to do that. My question is should they exercise it?

Mr. **Destro**. I think that is a power very much like the war power or the impeachment power. It is a power which exists but which ought to be very, very carefully circumscribed and very rarely used. I think it was put in the Constitution for a reason. That reason was to provide the check and balance—one of the checks and balances on the judicial branch. I think it would work—the Supreme Court's jurisdiction has been expanded in the past. I am certain that at times in the future it will be expanded again. I think it really rests within the discretion of the Congress as to whether it considers those areas serious enough to warrant the exercise of that power.

Senator **Leahy**. Do you agree with the presentation of the Commission that affirmative action using goals and timetables rather than quotas will continue to be an important civil rights tool for the future?

Mr. **Destro**. If I understand your question correctly, goals and timetables—I have no problem with goals and timetables. I think those are things which I think you use as benchmarks to measure your progress. I just cannot foresee any difficulty with that.

Senator **Leahy**. Dr. Quintanilla.

Dr. **Quintanilla**. I do not perceive any problems at all.

Mr. **Dombalis**. I agree.

Senator **Leahy**. Do you think that the Government should give tax breaks, such as tax exemptions to schools that maintain policies of racial discrimination?

Mr. **Destro**. No.

Dr. **Quintanilla**. No.

Mr. **Dombalis**. No.

Senator **Leahy**. I tend to agree with you.

Does the Commission have any role in the question of school prayer, in your mind?

Mr. **Destro**. Not really, at least in my view.

Dr. **Quintanilla**. I do not believe so.

Mr. **Dombalis**. Same.

Senator **Leahy**. Are you familiar with the Legal Services Corporation and their actions in the civil rights bill?

Mr. **Destro**. Yes; I used to volunteer for the legal aid in Cleveland and did some work——

Senator **Leahy**. Haven't we all?

Mr. **Destro**. They have done some very good work in the area and I have some friends in Cleveland that are still working effectively in that area.

Senator **Leahy**. Do you think maintaining the Legal Services Corporation is consistent with protecting civil rights of poor Americans?

Mr. **Destro**. Certainly I do.

Dr. **Quintanilla**. I do.

Mr. Dombalis. Yes.

Senator Leahy. Might you say that if we were to cut off the Legal Services Corporation, that we remove one tool available to protect civil rights for Americans?

Mr. Destro. I would say that is an accurate statement.

Dr. Quintanilla. Yes.

Mr. Dombalis. Yes.

Senator Leahy. I think that some members of the committee may want to submit some questions. I think we should leave the record open in case Senator Denton, Senator Thurmond, Senator Mathias, or anybody else wishes to submit questions for any one of you.

Mr. Short. The chairman indicated he will leave it open until the close of business today.

Senator Leahy. We will recess for 2 minutes and then be back. We are finished with this panel.

[Whereupon, at 3:37 p.m. the committee recessed and reconvened at 3:45 p.m.]

Senator Leahy [presiding]. Could we have Mr. William Taylor, chairman of the Compliance/Enforcement Committee of the Leadership Conference on Civil Rights; Ms. Althea Simmons, director, NAACP, Washington Bureau; Ms. Frances Kissling, executive director, Catholics for a Free Choice; Mr. Edd Doerr, executive director, The Voice of Reason; and Mr. Arnoldo Torres, National Executive Director, League of United Latin American Citizens.

If these five can please come forward.

Can each one of you first identify yourself for the stenographer, please?

Mr. Torres. I am Arnoldo Torres.

Mr. Taylor. I am William Taylor.

Ms. Simmons. I am Althea Simmons.

Ms. Kissling. I am Frances Kissling.

Mr. Doerr. I am Edd Doerr.

Senator Leahy. Would you please stand and raise your right hand?

[Whereupon, the panel was duly sworn by Senator Leahy.]

Senator Leahy. Because I understand that I am going to be in about the same situation Senator Mathias was as a member of the Appropriations Committee, I am going to have to be going back to the floor where the appropriations bill is. I wonder if each of you might limit your opening statement to 5 minutes each and then we will determine what questions there might be. We will go in the order you are listed here and that would be first with Mr. William Taylor, the chairman of the Compliance/Enforcement Committee of the Leadership Conference on Civil Rights.

TESTIMONY OF WILLIAM TAYLOR, CHAIRMAN, COMPLIANCE/ENFORCEMENT COMMITTEE, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, D.C.; MS. ALTHEA T. L. SIMMONS, DIRECTOR, NAACP, WASHINGTON BUREAU, WASHINGTON, D.C.; MS. FRANCES KISSLING, EXECUTIVE DIRECTOR, CATHOLICS FOR A FREE CHOICE, WASHINGTON, D.C.; EDD DOERR, EXECUTIVE DIRECTOR, THE VOICE OF REASON, WASHINGTON, D.C.; AND ARNOLDO TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, WASHINGTON, D.C.

Mr. **Taylor**. Thank you. I am William Taylor.

I appreciate the opportunity to be here on behalf of the Leadership Conference——

Senator **Leahy**. Excuse me. I should note that, naturally, your full statement, if not encompassed all within that 5 minutes, will be included in the record in full.

Mr. **Taylor**. Thank you. I appreciate that.

The views I express today for the Leadership Conference grow in part out of 7 years of experience I had at the Commission on Civil Rights, including several years as general counsel and later as staff director for President Johnson.

The Leadership Conference on Civil Rights is here today to bring to this committee's attention the serious threat to the Commission's independence posed by President Reagan's decision to engage in wholesale replacement of the Commission's members. We do not oppose or support these three nominees whose confirmation the committee is considering. Rather, we urge that the Committee and the Senate give the most careful scrutiny to the qualifications and views of the three nominees and that approval be given only if the Senate is satisfied that the nominees are prepared to carry out the mandate of the Commission independently of the dictates of the Reagan administration.

Now the Commission is, in some respects, an unusual body. It is very much like an independent regulatory agency. It has the duty to appraise the laws and policies of the Federal Government with respect to equal protection of the laws and that is a particularly crucial duty for the Commission. For the Commission to carry out that role, its members have to be careful to exercise independent judgment, to point out failures by departments in the executive branch and, indeed, where necessary, to be critical of the President's performance of his duties, to take care that the laws are faithfully executed.

I think it is fair to say that the Commission's positive reputation over the years rests as much on the part of Commissioners in taking issue with the Presidents who appointed them as on the reliability of the agency's investigations and research. Congress recognized this when it established the Commission. It said the Commission had to be independent. It said it had to report to the Congress as well as the President. It said Federal agencies should cooperate. But the one major gap in assuring the independence of the agency is the failure of Congress to provide fixed terms of office, as it does with regulatory agencies. Because the agency was viewed as temporary, no terms were specified and the Commissioners have served at the pleasure of the President.

Over the years, however, Presidents have recognized and respected the Commission's need for independence and with one exception, that being President Nixon's firing of Father Hesburgh as Chairman, members of the Commission have been replaced only when they voluntarily resigned because of ill health or for other personal reasons. President Reagan now has broken with this bipartisan tradition to force the resignations of five Commissioners, with every indication that he will soon replace the sixth member and the agency's staff director. While he may arguably have the authority to name a new Commission, his actions clearly threaten to subvert the agency's ability to carry out its statutory responsibilities. His actions come at a time when his administration is undermining the national policy of equal opportunity for all persons that has been built up so arduously over the past three decades by his predecessors, the courts and the Congress. I think Senator Metzenbaum in his statement detailed the actions that this administration has taken, very effectively.

The current Commission has had and would have no hesitation in investigating these administration actions and reporting candidly and dispassionately their impact on the rights of minorities, women, disabled people and the elderly. My major question is whether the new Commissioners and nominees are prepared to do likewise.

The information the Leadership Conference has compiled about the three nominees indicates that they have records of accomplishment in areas other than civil rights principally but it offers few clues on their readiness to act independently even at the cost of challenging the person to whom they owe their appointments. None of the Commissioners said what Mr. Pendleton has said which is, "I have no choice but to support the administration's policy." That is a statement he retracted before this committee. On the other hand, to our knowledge, no nominee has indicated publicly disagreement with any of the steps the Reagan administration has taken to weaken civil rights enforcement.

I listened very carefully, Mr. Chairman, to the statements the nominees made before you today and I must say, I still do not hear any indication of real disagreement with the administration's policies.

I might add, although I see my time is running, it seems to me Professor Destro's statement about the Baton Rouge case is disingenuous. I do not think anybody who is familiar with the administration's position on school desegregation thinks that the administration is seeking a more effective remedy in its steps to dissolve the remedy that is already in force in Baton Rouge.

I have listed several areas in my testimony, some of which you have covered in your questioning and Professor Destro's testimony in 1978. I would just, in conclusion, add that I am very troubled by the statement made by Professor Destro that the 14th amendment was very limited and had nothing to do with political or civil rights, such as one man, one vote; desegregation or abortion.

Now, that is a very sweeping statement. It may be in tune with the Justice Department's views that fundamental rights are to be decided by legislatures, not courts. It may be in tune with the view of the witnesses in response to your questions, that the Congress has the complete authority to overrule Supreme Court constitutional decisions by simple legislation rather than by amendment.

But we agree with Linda Greenhouse's observation that that is a radical vision and out of keeping in its entirety with constitutional jurisdiction precedent. If that represents Professor Destro's views, I think he is acting hostile to the views of minorities.

You have got a tough job here and I hope what we have outlined gives you some assistance in trying to perform that job.

Thank you.

Senator **Leahy**. Thank you.

Ms. Simmons?

Ms. **Simmons**. My name is Althea T. L. Simmons and I am chief lobbyist for the NAACP. I came to express very strong reservations about the nomination of Mr. Destro as a member of the Commission.

After hearing Mr. Destro today, I am even more strongly opposed to his nomination.

I will not comment on some of the issues in my written testimony because they have been brought up either by members of the committee in questioning or by Mr. Taylor in his remarks just a few minutes ago.

We are concerned about Mr. Destro's comments made in 1978, some of which have been expressed today. We noted that he equated the problem of a Polish American executive who is limited to the low rungs of his company because of ethnicity to a nonwhite who has been precluded from a job because of racial identity.

We submit, Mr. Chairman, that those two categories of problems are not comparable. As a matter of fact, in contemporary America we know that blacks and browns have been prevented from various aspects of America because of the fact that they are blacks or browns. We also know persons who have been denied bank loans because of their color and not because of their ethnicity. We know that blacks and browns have been denied entry into schools because of their color and not because of their religion or ethnicity.

As a matter of fact, we believe that Mr. Destro has a very curious view of what the Civil Rights Commission is mandated to do. Although the Congress has clearly charged the Commission to collect information on discrimination and to submit reports, findings and recommendations to the President and Congress, he, in 1970, took exception to this Commission's bent on what he calls conclusion making. In his view the Commission should not reach conclusions but should instead offer considerations. We think to do that would be irresponsible.

We have also serious reservations about his qualifications to be a member of the Commission. We did do a background check on Mr. Destro and we found that in his own native area of Wisconsin, that his organization is not known as a civil rights organization and that he had not been, according to a number of individuals there, involved in civil rights activities.

The NAACP is quite concerned about civil rights. It has been the cutting edge of the movement and, it is still trying to improve the political, educational, and social status of minorities. The Civil

Rights Commission has been extremely helpful in that regard because it has issued the kinds of reports that have helped make the job an easier one.

It occurs to us that, in this present climate, with the concerted assault by Government on its citizens, its poor, elderly, women, and the attempts to roll back over 50 years of social progress, we need a Commission on Civil Rights to be more vigilant than ever before.

Just this morning I attended oversight hearings and heard the Chairman of the Commission on Civil Rights testify. I was quite concerned because there is a smaller budget. They said they were going to cut off 33 staff persons. The Commission would issue fewer reports and more contemporary reports. I am not quite certain what that means but I came away after that hearing this morning feeling that the Civil Rights Commission, as perceived by the Chairman, is going to be doing very little in civil rights.

After checking out Mr. Destro's record, I became quite concerned. I listened to the questions being asked this afternoon of the other members who have been nominated and I am concerned about the direction of the Civil Rights Commission and how the persons who are being nominated to office—perceive their role because I got no evidence from the answers they tendered as to how they perceive their role on issues we find crucial to the civil rights community.

Therefore, Mr. Chairman, I would certainly urge this committee to give careful consideration to the persons who are before you for membership on that Commission because we do view, with extreme trepidation, the confirmation of those three as Commissioners and we now, having sat in this afternoon's hearings, have severe reservations about the other two persons being nominated.

Thank you so much for the opportunity to appear before the committee.

Senator **Leahy**. Thank you, Ms. Simmons.

Next we have Frances Kissling, executive director of Catholics for a Free Choice.

Ms. **Kissling**. My name is Frances Kissling and I serve as executive director of Catholics for a Free Choice.

I have very grave concerns about the nomination of Robert Destro to the U.S. Commission on Civil Rights.

Catholics for a Free Choice has followed Mr. Destro's career since its inception in 1977. Our opposition to his appointment is based on his record as general counsel for the Catholic League for Religious and Civil Rights and on his 1978 testimony against the extension of the Commission.

His work as general counsel is, we believe, characterized by an almost exclusive attention to litigation aimed at blocking a woman's constitutionally guaranteed right of free access to legal abortion and contraception.

Indeed, one of the chief difficulties we found in preparing our testimony was the absence of any activities that resembled the civil rights law practice Mr. Destro referred to in his 1978 testimony as well as in his testimony today.

During questioning in 1978 Mr. Destro was asked to provide a better sense of his organization's activities and the kind of caseload he had. At that time Mr. Destro pointed out that the league was "in the process of expanding greatly its legal capabilities." He was not in a position to characterize all of their cases but would submit a summary of those cases in writing. We would be interested to know whether such a summary was provided at that time and we think it is imperative that a summary be presented again at this time.

In the interim, we have done a check on Mr. Destro's case history as a civil rights attorney. Going through Lexis, the standard computerized research tool used by most lawyers, we found 14 cases in which Mr. Destro is listed. Eleven of those cases were directly related to abortion or contraception. The other three cases dealt with workplace discrimination against ethnic Catholics.

We would note that the three areas in which Mr. Destro points to the Commission as placing its chief priorities in the next years of its existence—immigration, women's rights, and voting rights—are areas in which Mr. Destro has no specific legal experience. We, therefore, wonder what does he bring to the Commission in terms of the examination of those issues?

It is not easy, therefore, to discuss Mr. Destro's legal record as a qualification for membership on the Commission. For the only area in which he continues to show experience over the past 5 years is the area of abortion and he himself has said that he does not feel that the Civil Rights Commission should deal with the issue of abortion.

However, we feel it is extraordinarily dangerous to have on the Commission a member whose entire history is devoted to one aspect of what may or may not be construed as a civil right. Membership on the Commission carries with it substantial prestige. We are not convinced by Mr. Destro's statement that he does not think the Commission should deal with the issue of abortion, we are not convinced that he will not be on the road speaking out from a prolife perspective consistently and using the prestige of the Office of the Commissioner to state those views. This would not be any different from any number of other appointees that President Reagan has named to various Commissions and to various positions in his administration.

Moreover, we worry that any Commissioner who views the work of the Commission in a way that is substantially different from that which has been carried on in the past 20 years, would in fact be detrimental once at the Commission itself.

We have other examples of Reagan appointees who in fact demoralize staff and create intraagency difficulties in terms of the conduct of business. We are concerned, both in the area of abortion and in his concern for Caucasian ethnic minorities, that Mr. Destro would be such a problem at the Commission.

We would like to also state that Mr. Destro has on a number of occasions pointed to the shoddy research that the Commission has done in the past, particularly dealing with the report on the constitutional aspects of the right to limit child bearing. We would like this body to take a look at Mr. Destro's record in this area. We wonder if we can expect Mr. Destro to live up to his own standards. Up to today Mr. Destro and the Catholic League used the 1975 Ladd Lipset report on the American professorate as their major indicator of discrimination against Catholics. Not once does the league or Mr. Destro mention the fact that Catholics now comprise the largest single faith group in the U.S. Congress or that a number of 1980 surveys have shown that Catholics in all areas of the United States except the South have the highest income and educational achievement of any faith group except Jews. Instead, they make reference to the paucity of Guggenheim grants to Catholics.

Is that one-sided presentation by Mr. Destro consistent with his desire that the Commission report completely on all sides of the picture?

With all due respect to the genuine problems of religious and ethnic discrimination, I must also ask if this is the way Mr. Destro would see the U.S. Commission on Civil Rights spend its share of diminishing Federal funds: examining the problems of Wall Street lawyers and Boston bankers and Guggenheim grantees.

As a religious Catholic and a Polish American, I want to assure this committee that it is not the desire of these constituencies to see the investigation of pervasive discrimination against minorities shoved aside to deal with the civil rights of fetuses or Wall Street lawyers.

And, if those are not to be the major concerns of the U.S. Commission on Civil Rights, then there is no doubt that Mr. Destro presents the Commission with neither credentials nor commitment that would be particularly useful to its critical tasks.

Mr. Chairman, we urge you to reject this nomination.

Senator **Leahy**. Mr. Doerr, go ahead, please.

Mr. **Doerr**. Thank you, Mr. Chairman, for allowing me this opportunity. I am the executive director of the Voice of Reason, which is a fairly new organization founded in 1981 to offset some of the extremist tactics that we have seen in politics.

We are rather disturbed at the appointment of Mr. Destro to the Civil Rights Commission, and while he is an able attorney, apparently, we feel that probably there are a lot of other jobs he could hold better than this one.

In testimony before this very committee in June of last year, Mr. Destro took sharp issue with the Supreme Court's ruling in *Roe* v. *Wade* of 1973 which made it clear that the right to privacy and the 14th amendment cover a woman's right to terminate a problem pregnancy. Mr. Destro spoke ill of that ruling. He spoke ill of that civil right, that constitutional right, and he spoke ill of women who exercise that right in testimony before this very committee.

Most of Mr. Destro's career has been with the Catholic League for Religious and Civil Rights. I assume he is in sympathy with the goals and targets of that organization. Among the founders of the Catholic League for Religious and Civil Rights, and I presume he shares their views, is Father Virgil Blum. For 30 years, and especially for the last 10 years, Father Blum has advocated tax support for sectarian private schools which practice all sorts of discrimination in hiring, discrimination against the handicapped, discrimination against the poor, and sometimes discrimination against ethnic minorities in various private schools.

Mr. Destro, earlier this afternoon, said he opposed a dual school system based on race. But he apparently has advocated a dual school system based on religion and social class and in other ways.

This does not seem like the leadership we need in the Civil Rights Commission.

The league with which Mr. Destro was associated as general counsel has sought to divide the public along sectarian lines. They have advocated the creation of sectarian caucuses in the U.S. Congress. This, obviously, is the sort of thing that would cause Jefferson and Madison to turn over in their graves. They believed that the first amendment was intended to prevent political division along religious lines.

Before this very committee Mr. Destro took exception to the U.S. Supreme Court's holding in the case of *Lemon* v. *Kurtzman* back in 1971—I think I was in error in my written statement. I said 1973. It should be 1971.

In that decision, the Supreme Court said that legislation may be constitutionally suspect if it stimulates political division along religious lines, and Mr. Destro spoke ill of that. He seems to think that political division along religious lines is acceptable.

Mr. Destro's organization has sought to stifle freedom of expression when it comes to anything critical in the area of religion.

We are a pluralistic nation and if some religious groups or people are going to advocate imposition of sectarian positions in the political arena, it is essentially legitimate game for the media, political cartoonists, and so forth, to discuss these things.

Mr. Destro has sought to stifle expression in this area. He has further sought to stifle this expression by its reaction to votes taken in this body, the U.S. Senate, back in 1978. You will recall in August 1978, the Senate turned down the Packwood-Moynihan tuition tax credit bill, 56 to 41. The Catholic League has printed material indicating that the tax credit bill was defeated in 1978 because of "anti-Catholic bigotry."

This means that half of the 14 Catholics in the U.S. Senate in 1978 were anti-Catholic, according to Mr. Destro's organization.

This kind of verbal abuse is just intolerable.

Now the committee has to vote on the appointment of Mr. Destro to the Civil Rights Commission. We believe the Senate could do well to reject this appointment.

In closing, I would like to associate myself with the statements of the three previous witnesses and state that in listening to the three appointees, I was somewhat bemused and shocked by one appointee's failure to understand Senator Leahy's question about court-stripping after it was explained in some detail.

Thank you.

Senator **Leahy**. I was, too.

Thank you, Mr. Doerr.

Mr. Torres?

Mr. **Torres**. Thank you. I appreciate the opportunity to come before you on the nominations of the three individuals to serve on the U.S. Commission on Civil Rights.

I am Arnoldo Torres and I am the executive director of the League of United Latin American Citizens, this country's oldest and largest Hispanic organization.

The first point I would like to raise is in reference to Senator Metzenbaum's comments, introductory comments, that were extremely appropriate. Unfortunately they will not receive the attention they merit in this political arena in view of the times.

The opportunity or the possibility of defeating or not confirming the three individuals does not stand much of a chance, if we consider some of the other nominations that have already been confirmed by the Senate.

But I think there is a great deal of merit in the principle that Mr. Metzenbaum raises, one that I would hope could receive more attention as the Senate has the opportunity to read the hearing record of today.

But let us look at some of the people that the administration has appointed to serve on commissions as well as other Federal agencies which deal with civil rights. Mr. William Bell's nomination to the EEOC was withdrawn. Mr. Sam B. Hart withdrew himself from consideration to the Civil Rights Commission after a tremendous amount of controversy. Mr. Clarence Pendleton had opposition and controversy and is an individual that just recently issued a statement that there should be a different pay rate for youths. He used his position as the Chairman of the Commission on Civil Rights to get that kind of publicity. Clarence Thomas got opposition and continues to get a great deal of criticism as the Chairman of the EEOC. And, finally, we look at the Legal Services Corporation. Five individuals received a great deal of opposition and controversy. One will probably not get confirmed.

So there is in fact a tremendous need to be much more thorough in our assessments and examination of the types of individuals that are being nominated to these positions because they, in fact, will stifle the concepts, the programs, the mandates, and the statutes that govern civil rights in this country.

I would submit to you that the President has done an extremely effective job of accomplishing this objective. He not only has appointed extremely controversial people that should not be considered for these positions but he has also done an effective job of cutting civil rights agency budgets, thereby cutting off any effective means of enforcement.

But with regard to Mr. Destro, here is a gentleman who discusses minorities as approved minorities. I do not know what an approved minority is. He indicated in his statement in 1978 that the Civil Rights Commission, in many of its reports, * * * "has provided us with a consistent emphasis on certain approved minorities * * * " and has stated that much of their research can be considered as shoddy. He has called it a governmentally funded lobby. He responded that what he meant by social interest groups was that the Commission was representing the rights of abortion advocates.

But in the specific context of what he stated, he does not talk about abortion. He talks about approved minorities. I do not know what an approved minority is and what they are being approved for but if in fact he means that they are people of color, Hispanics, handicapped, those identified in the governing statements of the Civil Rights Act, then it almost appears as if he refers to them with some amount of animosity, that because they are getting some attention on their problems, he has some reservations with that. He is bothered by that.

I would think the scenario that could in fact result from Mr. Destro's being confirmed is one in which, if he does not get attention focused on Catholics, 90 percent of all Hispanics in the world are Catholics so we like Catholics tremendously, but if in fact the problems of Catholics are not going to be addressed in the context that he likes, he is going to pick up his marbles and go home. He is not going to cooperate. He will not be a cooperating element of the Commission.

I do think, with all due respect to Mr. Destro and his commitment and involvement in this issue, that perhaps he should continue to teach and perhaps should continue to work for the Catholic League. We have very serious reservations. We could easily indicate opposition to Mr. Destro, but I, unfortunately, believe that the Senate would not oppose Mr. Destro's confirmation, even though in principle that is precisely what it should do.

Thank you very much.

Senator LEAHY. Thank you very much.

I have no questions of the panel. Having listened to panels for 8 years on everything from agricultural matters to nuclear war, I rarely have ever heard a panel be so specific in such a brief and concise way without being just five redundant voices. I applaud you for it.

I do appreciate what you have said. I have no further questions and I thank you very much for being here.

[The prepared statements of Mr. Taylor, Ms. Simmons, Ms. Kissling, Mr. Doerr, and Mr. Torres follow:]

PREPARED STATEMENT OF WILLIAM L. TAYLOR

Mr. Chairman and members of the committee, my name is William L. Taylor and I appreciate the opportunity to appear today on behalf of the Leadership Conference on Civil Rights, a coalition of more than 160 civil rights, labor, civic and religious groups whose common purpose is to secure the enactment and enforcement of strong laws assuring equal protection for all persons. I serve as Chairman of the Leadership Conference's Committee on Compliance and Enforcement as well as being Director of the Center for National Policy Review at Catholic University Law School.

The views I will express today also grow out of seven years of experience at the U.S. Commission on Civil Rights, as General Counsel and later as Staff Director nominated by President Lyndon Johnson.

The Leadership Conference on Civil Rights is here today to bring to this Committee's attention the serious threat to the Commission's independence posed by President Reagan's decision to engage in wholesale replacement of the Commission's members. We do not oppose or support the three nominees whose confirmation the Committee is considering. Rather, we urge that the Committee and the Senate give the most careful scrutiny to the qualifications and views of the three nominees and that approval be given only if the Senate is satisfied that the nominees are prepared to carry out the mandate of the Commission independently of the dictates of the Reagan Administration.

In several respects the Commission is an unusual body. It is located in the Executive branch, but its structure and functions are similar to those of independent regulatory agencies. One function of the Commission—its duty to "appraise the laws and policies of the Federal government with respect to discrimination of justice" is particularly crucial. For the Commission to carry out this role properly, its members must be prepared to exercise independent judgment, to point out failures in the enforcement of civil rights laws by departments in the Executive branch and indeed, where necessary, to be critical of the President's performance of his constitutional duty to "take care that the laws are faithfully executed." It is fair to say that the Commission's positive reputation over the years rests as much on the courage of Commissioners in taking issue with the Presidents who appointed them as on the reliability of the agency's investigations and research.

Congress, in establishing the Commission, recognized this need for independence. From the outset in 1957, the authorizing statute has provided that no more than three of the six members may be of the same political party (Section 101b), that the Commission report to the Congress as well as to the President (Section 104b) and that all federal agencies shall cooperate fully with the Commission to enable it to carry out its duties effectively (Section 105e).

The one major gap in assuring the independence of the agency is in the failure of Congress to provide fixed terms of office, as it does with regulatory agencies. Because the agency was viewed as temporary (it has now been operating for a quarter of a century) no terms were specified and the commissioners have served at the pleasure of the President.

Over the years, however, Presidents have recognized and respected the Commission's need for independence. With one exception (President Nixon's firing of Father Hesburgh as Chairman), members of the Commission have been replaced only when they voluntarily resigned because of ill health or for other personal reasons.

President Reagan now has broken with this bipartisan tradition to force the resignations of five commissioners, with every indication that he will soon replace the sixth member and the agency's staff director. While Mr. Reagan arguably has authority to name a new Commission, his actions clearly threaten to subvert the agency's ability to carry out its statutory responsibilities. His action comes at a time when his Administration is undermining the national policy of equal opportunity for all persons that has been built up so arduously over the past three decades by his predecessors, the courts and Congress.[1] The current Commission has had and would have no hesitation in investigating these Administration actions and reporting candidly and dispassionately their impact on the rights of minorities, women, disabled people and the elderly. The major question is whether the new Commissioners and nominees are prepared to do likewise.

The information the Leadership Conference has compiled about the three nominees you are considering indicates that they have records of accomplishment (principally in areas other than civil rights), but it offers few clues on their readiness to act independently even at the cost of challenging the person to whom they owe their appointments. None of the nominees has been as imprudent as the new Chairman of the Commission who told the New York Times in November, 1981 that "I have no choice but to support [Administration] policy" (a statement he later retracted before this Committee). On the other hand, to our knowledge no nominee has indicated publicly disagreement with any of the steps the Reagan Administration has taken to weaken civil rights enforcement. Thus, we believe it falls to this Committee to gauge the willingness and capacity of the nominee to serve independently.

In the case of one of the nominees, Robert Destro, we believe there are other questions that call for answers. In 1978 testimony before subcommittees of the House and Senate Judiciary Committees, Professor Destro was sharply critical of the work of the Commission on Civil Rights. While that certainly is his prerogative, several of Professor Destro's observations seem to reflect a basic misunderstanding of the Commission's role. He said, for example, that if the Commission were to go out of existence: It would not be missed. Its functions, as I have seen so far, could well be carried on by interest groups such as the NAACP, the National Organization for Women . . .[2]

While the purport of these remarks is not clear, it appears either that Professor Destro viewed the Commission as the willing servant of civil rights groups or that he did not distinguish between the advocacy role of private civil rights groups and the factfinding and reporting functions of the Commission. In either case, we believe he was wrong. It is important for the Committee to ascertain whether in his post as a commissioner he would view himself as the spokesman for groups he has represented in the past.

In the same testimony, Professor Destro suggested that on some controversial issues the Commission should analyze problems but not offer its own opinions or recommendations. As the Committee knows, in the field of civil rights, almost every issue worth discussing is controversial. Many of the Commission's recommendations that stirred the most heated debate at the time they were issued have subsequently become the law of the land—the recently extended Voting Rights Act of 1965, for example. The Congress has said in the authorizing statute that it wants the agency's considered judgment on tough questions. If Professor Destro does not believe that is an appropriate role of the Commission, perhaps he should not serve.

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[1] The anti-civil rights actions of just one department, the Department of Justice, are detailed in Without Justice, a report issued by the Leadership Conference in February, 1982. Almost every week, the Justice Department adds new chapters to what is becoming a chronicle of shame.

[2] Hearings before the Senate Subcommittee on the Constitution, 95th Congress, first and second session, p. 256.

Also, in his testimony, Professor Destro charged the Commission with a constant emphasis on "certain approved minorities." [3] That reference, too, is less than clear, but it suggests that he may not understand the history of governmentally imposed caste systems in this nation. If his approach is to view remedial measures designed to redress discrimination against people who have been the victims of government oppression as efforts on behalf of "certain approved minorities", then I would suggest that Professor Destro has a fundamental misperception about the task of securing equal justice.

Also troublesome is an article in Professor Destro's approving the view of Raoul Berger that federal courts have an extremely limited role in protecting the rights of citizens. Of Berger's book *Government by Judiciary,* Destro wrote "it proves that the Fourteenth Amendment had a very limited function to perform and had nothing to do with political or 'civil' rights such as 'one man, one vote', desegregation, or abortion." [4] Now, this sweeping statement may be in tune with the emerging Justice Department view that fundamental rights are to be decided by legislatures not courts,[5] but it is wholly in conflict with *Brown* v. *Board of Education,* all of the Civil Rights Acts and more than a century of jurisprudence under the Fourteenth Amendment. It is, as Linda Greenhouse observed of the Justice Department's Supreme Court brief in the Akron and Missouri abortion cases: "A radical vision, profoundly at odds with decades of development in constitutional law that have stressed the primacy of the courts in interpreting the Constitution." [6]

If Professor Destro's statement represents his considered view rather than an offhand remark, then he will be properly regarded as someone who while professing devotion to the rights of minorities is seeking to restrict access to the only reliable forum for vindication of those rights—the federal courts.

In sum, Mr. Chairman, it seems to me that this Committee and the Senate are faced with a difficult exercise of their constitutional authority to "advise and consent." Rights that most people regarded as secure are now under seige in the Reagan Administration and the nation appears to be entering into a period in which race and other intergroup relations will be more volatile.

The Commission on Civil Rights is needed now as much as ever before by the Congress, the courts and the American public to serve as the informed conscience of government's efforts to make equal treatment under the law a reality for all. This Committee is faced with the difficult task of deciding whether approval of these nominees will permit the Commission to carry out this crucial role. I hope that these observations on behalf of the Leadership Conference will be of assistance to the Committee in delineating the issues and reaching a judgment.

PREPARED STATEMENT OF ALTHEA T. L. SIMMONS

Mr. Chairman and Members of the Senate Judiciary Committee, I am Althea T. L. Simmons, director of the Washington Bureau of the National Association for the Advancement of Colored People. We appreciate the opportunity to make this statement on behalf of the more than 1,800 branches and youth units of the NAACP which are located in every State of the Union and the District of Columbia.

The NAACP has very strong reservations about the nomination of Mr. Robert Destro to be a member of the Commission on Civil Rights. The Commission was mandated by Congress inter alia to investigate complaints of discrimination by reasons of race, color, religion, sex, age, handicap or national origin, and to submit reports, findings and recommendations to the President and Congress. It is a mandate which has been consistently and effectively carried out by the Commission on Civil Rights since its inception in 1957.

What gives us pause about the Destro nomination is the very strong attacks he made against the commission in his 1978 testimony at the commission's reauthorization extension hearings held by the Subcommittee on Civil and Constitutional Rights. In his testimony, Mr. Destro called for the abolition of the commission as it was presently constituted because of what he alleged was its bias in choosing issues to be investigated and its shoddy scholarship. He characterized the commission as an advocacy agency whose functions could just as well be carried out by such special interest groups as the NAACP, the National Organization of Women, the American Indian Movement, etc. Indeed he called the Civil Rights Commission a "government lobby for special interest groups." Further, he took the Commission to task for its alleged inattention to the problems of religious and white ethnic discrimination in favor of inordinate attention to the problems of what he called the "approved minorities", i.e., blacks, latinos, native Americans, other non-whites and women. Mr. Destro then went on to equate the problems of a Polish or Italian executive who was limited to the lower rung of the corporate ladder because of his ethnicity to a non-white who was precluded from a job, period, because of his racial identity. Mr. Chairman, we submit that the two categories of problems are not comparable and the suggestion that they are worthy of the same attention demonstrates a serious lack of knowledge of American higory. A white skin, no matter the ethnic affiliation, means automatic access to opportunities that simply are not available to a person with a non-white skin.

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[3] *Ibid.* p. 253.

[4] Destro, "Some Fresh Perspectives on the Abortion Controversy", *Human Life Review,* Spring, 1978, p. 23.

[5] See the *New York Times,* August 10, 1982, p. B6.

[6] *Id.*

In Contemporary America we know of no Catholic or white ethnic who has been prevented from voting because of his religion or ethnicity but we do know blacks and browns who have; we know of no Catholic or white ethnic who has been denied a bank loan because of his religion or ethnicity but we do know blacks and browns who have; we know of no Catholic or white ethnic who has been denied entry to the school of his choice but we do know blacks and browns who have; we know of no Catholic or white ethnic who has been denied housing because of his religion or ethnicity but we do know blacks and browns who have. In short, the problems of a Catholic or white ethnic are in no way comparable to those of our citizens who are racially and/or culturally identifiable. We find Mr. Destro's insistence on comparing what he alleges to be religious and white ethnic discrimination with the discrimination that is confronted by people of color in this country to be glib and irresponsible.

In addition, Mr. Chairman, Mr. Destro has a very curious view of what the Civil Rights Commission was mandated to do. Although Congress clearly charged the Commission to collect information on discrimination and to submit reports, findings and recommendations to the President and Congress, Mr. Destro takes exception to the Commission's bent for what he calls "conclusion" making. In his view, the Commission should not reach conclusions but should instead offer "considerations." We do wonder how the Commission can fulfill its mandate to offer recommendations if it has not first reached conclusions about the data it has collected.

Mr. Chairman and members of the committee, we also have serious reservations about Mr. Destro's qualifications to be a member of the Commission. Mr. Destro has described his former employer, the Catholic League for Religious and Civil Rights as a "National Civil Rights Organization," an organization he described as a combination Jewish Defense League and American Civil Liberties Union. However, not one of the Milwaukee Civil Rights organizations with which we communicated recalls league support for any local civil right activities. Although we have not examined the league's docket, it would be interesting to see if it contains any cases which do not deal with anti-abortion or aid-to-parochial-schools or other assorted religious issues.

Mr. Chairman, the NAACP is the oldest and largest civil rights organization operating in the country. It is the cutting edge of the civil rights movement. Its objective is the same as it was when the association was founded 73 years ago: to improve the political, educational, social, and economic status of minority groups. Today more than at any other time since reconstruction, there is a need for those of us concerned with civil rights to redouble our efforts to retain the civil rights gains made during the last 25 years. Clearly one of the instruments which aided us in our struggle to achieve the goals of the past quarter of a century has been the Commission on Civil Rights. The Commission has raised the consciousness of congress, the President, in fact, the entire nation, about the plight of non-whites in this country regarding housing, education, employment, administration of justice, etc. The Commission has also apprised us of the problems of discrimination faced by the aged, and contrary to Mr. Destro's assertions, the Euro-Americans and non-protestants.[1]

With the concerted assault on government assistance to and protection of the poor, the elderly, minorities and women, with the congressional and administration attempts to roll back over 50 years of social programs, we in the civil rights community need a commission on civil rights that is more vigilant than ever. We do not, as Mr. Destro believes, need fewer reports issued on the problems of "approved minorities" but rather we need more or them. Not only must we have more reports like the recently issued "confronting racial isolation in Miami," but more important, we must heed the recommendations contained in them.

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[1] See "Religious Discrimination: A Neglected Issue" A consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., April 9–10, 1979, 541 pp.; "Civil Rights Issues of Euro-Ethnic Americans in the United States: Opportunities and Challenges", A consultation sponsored by the U.S. Commission on Civil Rights, Chicago, Illinois, December 3, 1979, 592 pp.

Therefore, Mr. Chairman and members of the committee, the NAACP views with extreme trepidation the confirmation of Robert Destro as Commissioner on the U.S. Commission on Civil Rights.

PREPARED STATEMENT BY FRANCES KISSLING

Mr. Chairman, my name is Frances Kissling and I served as Executive Director of Catholics for a Free Choice. Catholics for a Free Choice is a non-profit, tax exempt, educational organization with national membership. Its primary goal is to preserve the constitutionally guaranteed right to choose abortion. We have a special interest and expertise in the area of women's civil and constitutional rights, particularly as related to reproductive rights. These issues are approached from a firm commitment to social justice and equality, as embodied in Roman Catholic traditions. Within the Church, we also work to protect the right, indeed the obligation, of Catholics to conscientiously dissent from Church teachings without fear of discrimination or reprisals.

Therefore, we appreciate the opportunity to testify on President Reagan's nomination to the U.S. Commission on Civil Rights of Robert A. Destro, who until recently has been employed as General Counsel with the Catholic League of Religious and Civil Rights.

Most of our testimony will be related to his work as General Counsel for the Catholic League for, to the best of our knowledge, it is from that work that we can judge his professional and personal commitment to civil rights.

We have followed Mr. Destro's career with considerable concern and dismay. It is, we believe, characterized by a singular, indeed, almost exclusive, attention to litigation aimed at blocking a woman's constitutionally guaranteed right of access to legal abortion and to contraception.

Indeed, one of the chief difficulties we found in preparing our testimony was the absence of any activities that resembled the civil rights law practice Mr. Destro referred to in his 1978 testimony before this committee on the U.S. Commission on Civil Rights Appropriation Extension.

During questioning in 1978 Mr. Destro was asked to provide a "better sense of his organization's activities and the kind of case load [he had]." Mr. Destro pointed out that the League was 5 years old and "in the process of expanding greatly [its] legal capabilities." Thus, he said, he was not in a position to "categorize them all [but would] submit a summary of them in writing." In response to further questioning, he indicated that the League was involved in "most" of the abortion cases currently before the courts, but that it would be difficult to provide any percentage breakdowns on those or other cases.

We would be interested to know if the Committee received such a breakdown in 1978. We think Mr. Destro should provide an update at this time.

In the interim, we have researched the Catholic League Newsletter from 1978 through July 1982 and have done a computer check. Through *Lexus,* the standard computerized research tool used by most lawyers, to obtain detailed information on legal cases in which Mr. Destro is listed. This computer search showed 14 cases—11 of which were directly related to abortion. The other three were concerned with incidents of alleged discrimination against Catholics in the work place. We have appended to our testimony a list of those cases.

Thus, in considering his qualifications for membership on the U.S. Commission on Civil Rights, one is obligated to discuss both the absence of a civil rights record and those non-civil rights cases which form his professional record. It is not easy to discuss Mr. Destro's legal record in relation to the U.S. Commission on Civil Rights since the very area in which Mr. Destro has the most experience is an area which the U.S. Commission is currently prohibited from addressing—that of abortion rights. Moreover, in his writings, in his briefs, in his comments to the press and in other forums, Mr. Destro has consistently asserted that the "right to life" is, in fact and law, a civil right of the unborn.

Given this strong commitment on Mr. Destro's part and the fact that the U.S. Commission on Civil Rights Appropriation Extension will again be considered by the Congress in 1983, it is critical that this Committee carefully scrutinize Mr. Destro's views on the civil rights of the unborn and ascertain if he believes the U.S. Commission on Civil Rights should take up this subject and would he so recommend at the time of consideration of the appropriations extension.

Most importantly, if he believes it to be an appropriate matter for consideration by the Commission where, in his ordering of priorities, does it fit? The League and Mr. Destro have also consistently maintained that "no one is weaker or more defenseless" than the fetus. Does that mean that what he sees as the violation of its civil rights through a woman's exercise of her constitutional rights should take highest priority in the Civil Rights Commission's efforts? Are we to see regional offices holding hearings on these matters? Will Mr. Destro use his position as Commissioner to further the rhetorical violence and hatred that has so affected our populace in the continuing debate on abortion?

That these points need to be raised in considering a nominee to the Commission is an insult to the good work of the Commission and more importantly to those minorities most severely discriminated against in our society. I refer specifically to those "governmentally approved minorities—women, blacks, persons of Spanish origin, native Americans, Asian Americans and other persons of non-Caucasian heritage," whom Mr. Destro assured us in his 1978 testimony would be adequately and well served by "NOW, AIM, the NAACP, Hispanic-American and Asian American lobbies" should the U.S. Commission be dissolved.

Mr. Destro has shown by his professional history that women can expect from him no objective consideration of their problems in securing their civil and constitutional rights.

The recent defeat of the Equal Rights Amendment makes this a particularly delicate moment to address the issue of women. The current administration maintains that the laws to protect the civil rights of women are already on the books, and that a case-by-case approach to discrimination will ensure protection to that minority. Yet Mr. Destro is on record condemning even that quite restrained approach. In his 1978 testimony, he attacked the Commission for its report on "Sex Bias in the U.S. Code," setting the rights of women in invidious competition with the "many people [who] suffer from religious and ethnic discrimination who can be helped by an investigation into their problems" and concluding that "the Commission fiddles while the city burns." He has, we believe, further shown in his testimony and in his absence of any personal or professional affirmative action on behalf of the more traditionally recognized minorities that he is either insensitive to or unaware of the gravity of the problems faced by these minorities. He appears to be ignorant of the profoundly positive influence that the Commission has had on American society in the last twenty-five years, calling it a "federally funded lobbying group."

Mr. Destro claimed, in his 1978 testimony, that he did not consider it inappropriate for the Commission to devote some of its time to the problems of "government approved minorities"—he was simply of the opinion that unless the Commission also dealt with problems of religious discrimination and discrimination against Caucasian ethnics it had no real value and should be dissolved.

What are these instances of ethnic discrimination that so concern Mr. Destro? As examples, Mr. Destro raised the problem of an individual Italian American lawyer who was denied partnership in a Wall Street firm (Cravath, Swaine and Moore). That "executive suite" case, *Lucindo* v. *Cravath Swaine and Moore,* was Mr. Destro's showpiece effort in combatting job discrimination against ethnic minorities until 1981 when the League severed its relationship to the case due to irreconcilable differences with the client. Mr. Destro also expressed concern for the plight of Boston's bankers, citing the Commission's neglect of a study showing discrimination against Catholics employed in Massachusetts banks.

In his 1978 testimony, Mr. Destro also challenged the research and objectivity of the Commission. The only document he could cite that dissatisfied him was the 1974 Report on the Constitutional Aspects of the Right to Limit Childbearing. He called the report "shoddy" and cited "questionable legal scholarship."

We wonder whether we can expect Mr. Destro to live up to his own standards, for, up to today, Mr. Destro and the Catholic League use the 1975 Ladd Lipset Report on the American Professorate as their major indicator of discrimination against Catholics. Not once does the League or Destro mention the fact that Catholics now comprise the largest single faith group in the U.S. Congress or that a number of 1980 surveys have shown that Catholics in all areas of the U.S. except the South have the highest income and educational achievement of any faith group except Jews. Instead, they make reference to the paucity of John Simon Guggenheim grants to Catholics.

With all due respect to the genuine problems of religious and ethnic discrimination, I must ask if this is the way Mr. Destro would see the U.S. Commission on

Civil Rights spend its share of the diminishing federal funds: examining the problems of Wall Street lawyers and Boston bankers and Guggenheim grantees.

And as Mr. Destro, a Democrat who supported Ronald Reagan, knows, that money is likely to diminish even further in the future.

As a religious Catholic and a Polish American, I want to assure this Committee that it is not the desire of these constituencies to see the investigation of pervasive discrimination against minorities swept aside to deal with the civil rights of fetuses or Wall Street lawyers.

And, if those are not to be the major concerns of the U.S. Commission on Civil Rights, then there is no doubt that Mr. Destro presents the Commission with neither credentials nor commitment that would be particularly useful to its critical tasks.

Mr. Chairman, we urge you to reject this nomination.

PREPARED STATEMENT OF EDD DOERR

Mr. Chairman and members of the committee; my name is Edd Doerr. I am executive director of The Voice of Reason. The Voice of Reason is a nationwide nondenominational public interest educational organization dedicated to defending and strengthening our nation's heritage of civil rights, civil liberties, and religious and intellectual freedom.

We believe that the appointment of Mr. Robert Destro to the U.S. Commission on Civil Rights would weaken rather than strengthen that important agency. We have no doubt that Mr. Destro is an able attorney and advocate, and that he might be a welcome addition to any number of other agencies of the Federal Government. But we urge respectfully that his appointment to the Civil Rights Commission be rejected by this committee.

In testimony before this very committee on June 12, 1981, Mr. Destro took issue with several U.S. Supreme Court rulings which marked important advances for civil rights. He was critical of the Court's 1973 ruling in *Roe v. Wade* (410 U.S. 113), which held that a woman's Fourteenth Amendment right to privacy covers her right, subject to some restrictions, to terminate a problem pregnancy, and that the term "person" in the Fourteenth Amendment does not apply to fetuses. He was also critical of the Court's holding in 1973 in *Lemon v. Kurtzman* (403 U.S. 602) that legislation is constitutionally suspect of it stimulates "political division along religious lines . . . one of the principle evils against which the First Amendment was intended to protect."

In addition to testifying in favor of proposed legislation designed to eliminate the constitutional right to privacy recognized in *Roe v. Wade* and which would surely create "political division along religious lines," Mr. Destro has been associated as general counsel with an organization which has taken some very unhelpful stands on civil rights, the Catholic League for Religious and Civil Rights. While the League is to be commended for its ligitimate work against prejudice and defamation, it has nonetheless taken positions on civil rights issued quite opposed to important rulings by the Supreme Court.

The League has shown a disrespect for freedom of expression by applying pressure to obtain the withdrawal of printed matter it believed offensive to Catholics. It opposed the opening of a New York play, "Once a Catholic," objected to an article in the Washington Post on "Tax Breaks and Other Religious Issues," and got a New York public library to stop using a film on family planning.

The League has urged Catholic lawmakers to follow church leadership guidance on controversial policy matters, yet it attacked the Congressional Quarterly for reporting what the League had advocated. Fortunately, Catholic lawmakers are as independent of ecclesiastical pressure as Protestant and Jewish lawmakers.

The League has vigorously sought enactment of legislation to provide tax aid to sectarian private schools, though the Supreme Court has ruled all but the most peripheral and minor forms of parochiaid to be unconstitutional and has, in effect, made it clear that the First and Fourteenth Amendments guarantee a citizen's civil right not to have to live under a government which takes actions "respecting an establishment of religion." The League even circulated material in 1979 asserting that the U.S. Senate voted down a tuition tax credit bill in 1978 "because of anti-Catholic bigotry." This should shock the members of the Senate, including the half dozen or so Catholic senators who voted against the bill.

Bigotry of any sort is to be deplored and fought. But promoting passage of a sectarian policy agenda into law is something else. Indeed, sectarian pressures to get Congress to fund sectarian institutions or to impose on the whole population particular theological positions, such as that of "fetal personhood," can only weaken interfaith harmony and increase interfaith tension.

It might also be noted that the League does not represent the views of American Catholics any more than the Moral Majority or Christian Voice organizations represent American Protestants.

In conclusion, we believe that the work of the Civil Rights Commission is so important that its members should all be staunch supporters of civil rights and civil liberties. If Mr. Destro's views on these matters do indeed closely reflect those of his former employer, the League, then we do not believe that his appointment to the Commisson should be confirmed.

PREPARED STATEMENT OF ARNOLDO S. TORRES

Good afternoon, Mr. Chairman and members of the Senate Judiciary Committee, my name is Arnoldo S. Torres and I serve as the National Executive Director of the League of United Latin American Citizens (LULAC), this country's oldest and largest Hispanic organization with over 100,000 members in 44 states. We very much appreciate the opportunity to come before you today to discuss our views on the nominations of Mr. Robert A. Destro, Mr. Constantine Nicholas Dombalis, and Mrs. Guadalupe Quintanilla to serve on the U.S. Commission on Civil Rights.

Since the founding of the League of United Latin American Citizens (LULAC) in 1929, the League has been committed to working to insure that Hispanic-Americans are guaranteed their civil rights. This effort has been extremely difficult and at times very exasperating. There are many in our community who feel, and rightfully so, that their civil rights are not respected nor protected. Many feel that government agencies mandated to assure civil rights enforcement have ignored this responsibility when dealing with the Hispanic community in this country.

Furthermore, we have long experienced frustration in attempting to educate the public, and media as well as the political powers in Washington to this major problem confronting our community. Our attempts have been with the desire to be treated as residents of this country who are guaranteed constitutional rights, and not as an effort to separate ourselves from the other elements of American society.

Unfortunately, our efforts and those of our community have not brought about the level of institutional and attitudinal change we desire in order for all peoples to live and work harmoniously with one another. Much remains to do in educating the general public and its institutions to the problems of civil rights violations to our community as well as to others confronting the same adverse environment and conditions.

It is in this effort the U.S. Commission on Civil Rights has provided a major boost. The Commission, through its work, has served to alert the public to the condition of civil rights in this country and the problems suffered by many as a result of violations. We regard the independence of the Commission as vital to assuring that regardless of the political ideology which may be reflected at any one time, the issues to be addressed will be discussed, evaluated, and presented to the public based on the merit of the circumstances.

Recognizing the importance of the Commission's independence leads us to address the issue of those individuals who are selected to serve on the Commission. Presently, we are extremely concerned with the status of civil rights in this country and the commitment this Administration and Congress have to civil rights. Due to the fact that the Administration appoints the individuals to serve on this Commission and recognizing that this Administration has come under significant criticism for its backing away from enforcement of civil rights statutes, programs and concepts, we are extremely interested in better understanding the thoughts and concerns of those to be appointed to serve on the U.S. Commission on Civil Rights. For it is this group of people who will maintain and nurture the vital element of independence which is instrumental to the Commission doing its work.

In this regard we are pleased to indicate our support for the nomination of Professor Guadalupe Quintanilla. Professor Quintanilla has exhibited well her commitment to civil rights in her work with the Houston Police Force. She has contributed significantly to improving police-community relations not only in Houston but her work in providing language and sensitivity training to police forces has been studied and utilized in many other parts of the country. She has demonstrated her commitment to insuring civil and legal rights for all people. Contrary to the image that some would cast against civil rights organizations, we do not oppose all individuals who may have differing political beliefs. We wholeheartedly support Professor Quintanilla for her competence and longstanding record of commitment and contributions to the area of civil rights.

With regards to the nomination of Mr. Robert A. Destro, we have some serious reservations based on comments he has presented before the Senate Judiciary Committee in 1978. Mr. Destro in his testimony indicates serious problems with the Commission in its failure to address religious discrimination. In fact, Mr. Destro appears so concerned by this failure that he stated that, "In that respect, if its (U.S. Commission) tactics and its scholarship does not change, then we would have to go on record, reluctantly, as opposing its continued funding."

In addition, Mr. Destro, while supporting in concept the work and purpose of the Commission, continually refers to groups suffering discrimination as "approved" minorities. He states that, ". . . the Civil Rights Commission in many of its reports has provided us with a constant emphasis on certain approved minorities and has given us certain reports which can best be characterized as shoddy scholarship. It has, in effect, turned into a Government lobby for special interest groups."

What concerns the League about these comments and the general tone of the testimony Mr. Destro presented at this hearing was the impression of animosity towards what he refers to as "approved" minorities. Mr. Destro appears to be implying that the "approved" minorities are being favored. To begin with, we are somewhat perplexed as to what an "approved" minority is and as a result of this status what are the "approved" for?

In reading Mr. Destro's testimony we would concur that religious discrimination should be examined and that there is merit in this concern. However, we are extremely bothered by the fact that he would repeal the existence of the U.S. Commission on Civil Rights if such attention to religious discrimination was not to take place. We regard such an attitude as very inflexible and extreme. Surely, if our idea is good and its implementation needs refining, you don't scrap the idea.

Furthermore, Mr. Destro argues that the Commission has evolved into a "Government lobby for special interest groups." Is this not the same position Mr. Destro is taking with regard to his concern with lack of concern for religious discrimination by the Commission?

Based on his own comments we are extremely concerned that should Mr. Destro be confirmed that under the false play of religious persecution his attitude and actions could in effect impact very negatively on the working of the Commission. In view of the lack of concern and commitment by this Administration to civil rights this result cannot be considered impossible or improbable.

Therefore, while we strongly urge this Committee to confirm Professor Guadalupe Quintanilla, we have some very serious reservations with the nomination of Mr. Robert Destro and urge this committee to further study his nomination.

Senator **Leahy**. We will take a 2-minute recess and then go to Mr. Fred Rotondaro who is executive director of the National Italian-American Foundation here in Washington.

[Whereupon, at 4:18 p.m., the committee recessed and reconvened at 4:25 p.m.]

Senator **Leahy**. Mr. Rotondaro, would you raise your right hand?

[Whereupon, Fred M. Rotondaro was duly sworn by Senator Leahy.]

Senator **Leahy**. Please go ahead.

TESTIMONY OF FRED M. ROTONDARO, EXECUTIVE DIRECTOR, NATIONAL ITALIAN-AMERICAN FOUNDATION, WASHINGTON, D.C.

Mr. **Rotondaro**. I am Fred Rotondaro, executive director, National Italian-American Foundation, Washington, D.C.

I have had the opportunity and pleasure of knowing and working with Bob Destro over the course of the past couple of years. As an organization associated with the advancement of Italian-Americans and other ethnic groups, I have had the opportunity of calling Bob for advice and counsel, of referring possible instances of discrimination to Bob through his office in Milwaukee with the Catholic League for Religious and Civil Rights.

I might also point out that on several occasions I have had the good fortune of sitting down with Bob and discussing such issues as civil and religious rights.

In regard to my own background, I might quickly point out that I am from an ethnic organization which is at the moment largely concerned with Italian-American issues. I have had prior experience as an antipoverty director of a program in York, Pa., which was almost exclusively devoted to black and Hispanic causes and I have been president of an organization which handled mostly Eastern and Southern European ethnic affairs.

With that background in mind, I would like to state that my experience with Bob Destro has been that he is an extremely competent and knowledgeable individual who I feel has a very perceptive knowledge of what I would feel to be the major goals of the Office of Civil Rights, specifically those goals which would be concerned with the advancement and with the protection of those who are most affected by discrmination in the United States.

With that in mind, I think Bob brings a particularly relevant element to the Office of Civil Rights. I should say he really brings several elements. One is a very important recognition that though the intensity of discrimination in this country obviously is leveled, I would say, at blacks and Hispanics, nevertheless, discrimination still does exist with Southern and Eastern Europeans and that as long as that discrimination exists in very subtle forms, as Mr. Destro pointed out, then all of us are tarnished with the brush of discrimination and that the road to a freer society for any American is going to be that much more difficult.

I think Bob understands this very well and I think he has performed his function as an advocate for the Catholic League on behalf of Southern and Eastern Euorpeans and on behalf of Catholics with admirable skill and poise.

Senator **Leahy**. I am not asking in that regard. You have a Commission with limited resources and resources that would be limited even further under the administration's plan. Where do you see priorities? We can find discrimination in so many areas. It is not just areas of color or sex. Discrimination is in schools you may have gone to, regional discriminations, ethnic discriminations of varying degrees, short versus tall, tall versus short, discrimination against fat, fat versus thin. You can go on down a whole lot of areas of discrimination, discrimination against people who do and do not wear beards, people who are bald and not bald. I can give you a whole lot of areas of discrimination if we want to find that.

I have heard him discuss his concern about areas of discrimination against those Italian ancestors. I must have escaped that in my State. But I am well aware of other more obvious areas of discrimination, including in my own State, and so I ask where do you make the priorities in the Commission and has Mr. Destro from his background evinced a willingness to make those priorities?

Mr. **Rotondaro**. I think based on his testimony today, Senator—I do not think there is any doubt about it. My own personal point of view would be that Bob's three priorities should be—would be three of my top priorities, specifically, women's issues, voting rights, specifically as they relate to minorities. From the point of view of the fact that in politics there is power and if we take away the political power from minorities, then obviously their power, economic and social and in employment issues are going to be dramatically affected.

I think also, and this is a point that I really had not thought about to a great extent until Destro mentioned it, that the level of discrimination against individuals coming from Cuba, as an example, coming from other Latin American countries, can be rather extreme. I think that Destro made some very valid points in that priorities must be made. One of the previous individuals speaking in opposition to Mr. Destro identified herself as a Polish-American and said that Polish-Americans and other ethnic Americans would not want to take away the priority from where the discrimination really exists. Speaking on behalf of my organization, I must admit to that same sentiment. I do not think that Bob Destro would take that priority away. But I think what he would do is bring a very perceptive mind, a logical mind, an excellent background in civil rights to the problems of civil rights, for all Americans, recognizing also that discrimination does exist in a wide variety of factors, in situations in the United States.

Senator LEAHY. Do you feel he has shown a background in the area of voting rights discrimination?

Mr. ROTONDARO. With my knowledge of Bob, I would say yes. I cannot claim to have massively detailed types of information in this field. I have worked with Bob mostly in the field of discrimination in employment.

Senator LEAHY. What about discrimination against women?

Mr. ROTONDARO. Once again, I would not be able to testify to that to a substantial degree.

Senator LEAHY. Blacks?

Mr. ROTONDARO. I would, once again, have to respond in that same manner. I am not that totally conversant with Destro's background in those areas of discrimination. I would rely to a substantial degree on Mr. Destro's own testimony that he obviously feels that those areas are of extreme importance and I rely, quite frankly, as I say, on 2 years' knowledge of him as a very logical individual who can make a difference in those areas and I think he would.

Senator LEAHY. Thank you, Mr. Rotondaro. I appreciate you being here. You represent one of my favorite foundations.

If Ms. Smith, Brother Greene, and Mr. Daniel will please come up. This will be the continuation of the Judge Wellford hearing that we had closed subject to the original statement.

If I could have Ms. Smith, Mr. Greene, and Mr. Daniel come forward.

Could I have just the witnesses at the table, please, just Ms. Smith, Mr. Greene, and Mr. Daniel, please.

If you would stand and raise your right hand, please.

[Whereupon, Ms. Maxine Smith, Mr. N. T. Brother Greene, and Mr. Tom Daniel were duly sworn by Senator Leahy.]

Senator LEAHY. I will read certain items into the record and then turn the rest of this hearing over to the committee staff.

During the period of Judge Wellford's service, through fiscal year 1981, approximately 72 percent of terminated appeals from his court were affirmed or the appeals dismissed. Approximately 18 percent were reversed or vacated. The balance were remanded, remanded in part, or transferred or were handled by other than outright affirmance or reversal. Of the cases delineated as "civil rights" cases by the Administrative Office, approximately 78.5 percent of these were affirmed or appeals dismissed. Approximately 16.5 percent were reversed or vacated—1972-81.

After the first full year, 1972, during which appeals were considered from Judge Wellford's court, approximately 72 percent were affirmed or appeals dismissed; approximately 17 percent were reversed or vacated. Of those designated as "civil rights," approximately 80 percent were affirmed or appeals dismissed; less than 13 percent were reversed and vacated—1973-81.

The statistical data above reflected as to proportion of civil rights cases reversed or vacated in Judge Wellford's court was below the average as to percentage of all cases reversed or vacated during 1972-81 and 1973-81 on appeals in the sixth circuit. See attached chart A of data supplied by the clerk of the court of the sixth circuit.

Judge Wellford's percentage of reversals and cases vacated, for example, from 1973 to 1981 in civil rights matters was about 12.8 percent compared to 16.1 percent applicable to all cases in the circuit during that period. Judge Wellford's experience on all cases—not just civil rights—on the other hand, in that respect was near the sixth circuit norm.

We will put the rest of that into the record.

[The information follows:]

SUMMARY OF STATISTICAL DATA[1]

During the period of Judge Wellford's service, through fiscal year 1981, approximately 72 percent of terminated appeals from his Court were affirmed or the appeals dismissed. Approximately 18 percent were reversed or vacated. The balance were remanded, remanded in part, or transferred or were handled by other than outright affirmance or reversal. Of the cases delineated as "civil rights" cases by the Administrative Office, approximately 78½ percent of these were affirmed or appeals dismissed. Approximately 16½ percent were reversed or vacated (1972-1981).

After the first full year (1972) during which appeals were considered from Judge Wellford's Court, approximately 72 percent were affirmed or appeals dismissed; approximately 17 percent were reversed or vacated. Of those designated as "civil rights" approximately 80 percent were affirmed or appeals dismissed; less than 13 percent were reversed or vacated (1973-1981).

The statistical data above reflected as to proportion of "civil rights" cases reversed or vacated in Judge Wellford's Court was below the average as to percentage of all cases reversed or vacated during 1972-1981 and 1973-1981 on appeals in the Sixth Circuit (*see* attached Chart A of data supplied by the Clerk of the Court of the Sixth Circuit). Judge Wellford's percentage of reversals and cases vacated, for example, from 1973-1981 in "civil rights" matters was about 12.8 percent compared to 16.1 percent applicable to all cases in the Circuit during that period. Judge Wellford's experience on all cases (not just civil rights), on the other hand, in that respect was near the Sixth Circuit norm.

Attached is data from the Administrative Office (Chart B) relating to civil cases terminated on the average by District Judges:

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[1] This summary was prepared from information furnished by the Administrative Office of the United States Court and the Clerk of the United States Court of Appeals for the Sixth Circuit.

Year	Number of civil cases		Percent
	All judges	Wellford	
1978	316	344	+9
1979	278	320	+15
1980	311	317	+2
1981	345	315	−8

At the same time, Judge Wellford, and the other Judges of the Western District of Tennessee, were among the busiest in number of criminal trials per Judge handled during the 1978–1981 period. (See Chart C)

CHART A.—STATISTICS OF THE SIXTH CIRCUIT

Column 1 is the number of cases disposed of on hearing or submission on merits by judicial action in the Sixth Circuit.

Column 2 is the percentage of cases disposed of by reversal or dismissal in whole or in part by the Sixth Circuit.

Year	Column 1	Column 2 (percent)
1981	1,218	16.9
1980	1,085	14.5
1979	902	16.0
1978	823	13.0
1977	877	12.8
1976	769	15.3
1975	783	14.7
1974	662	19.0
1973	745	23.0
1972	679	20.6
1971	682	15.0

Workload Per Authorized Judgeship

CHART B

With the passage of the Omnibus Judgeship Act of 1978, the number of authorized judgeships in the district courts increased from 399 to 516. As a result, the number of civil cases filed per authorized judgeship declined to 300 cases in 1979. The steadily increasing influx of civil cases into the district courts caused this figure to rise to 327 in 1980. This trend was continued in 1981, with per judgeship filings reaching 350, or approximately the level at the time the Judgeship Act was passed. The large increase in dispositions resulted in per judgeship terminations rising to 345, compared to a previous high of 316 in 1978. With the small increase in the pending caseload, the number of civil cases pending per judgeship increased only slightly to 366, compared to the record of 417 cases in 1978. Table 15 summarizes the per judgeship workload during the twelve month periods ended June 30, 1940, 1950, 1960, 1970, and 1974 through 1981.

Table 15
Civil Cases Per Authorized Judgeship
During the Twelve Month Periods Ended
June 30, 1940, 1950, 1960, 1970, 1974 through 1981

Year	Authorized Judgeships	Civil Cases Per Authorized Judgeship		
		Filed	Terminated	Pending on June 30
1940 ...	183	190	204	161
1950 ...	218	296	244	255
1960 ...	245	242	252	250
1970 ...	401	218	201	232
1974 ...	400	259	244	268
1975 ...	400	293	262	299
1976 ...	399	327	276	351
1977 ...	398	328	294	386
1978 ...	399	348	316	417
1979 ...	516	300	278	345
1980 ...	516	327	311	361
1981 ...	516	350	345	366

Civil Filings

During the twelve month period ended June 30, 1981, a total of 70 districts experienced increases in the number of cases filed compared to 77 districts in 1980. The largest increases over 1980, other than the territorial courts, were in Louisiana, Middle (up 63.8 percent) and Washington, Eastern (up 46.8 percent). These increases were largely the result of rises in the number of prisoner petitions filed, especially prisoner civil rights cases. Nevada also experienced a large increase, with 39.7 percent more filings, primarily because of the substantial litigation resulting from the fire at the MGM Grand Hotel in Las Vegas. Other districts experiencing significantly higher filing levels were Maine and Tennessee, Middle, both up 36.2 percent, and Wisconsin, Western, up 35.7 percent. The largest declines in filing activity, other than the territorial courts, occurred in Florida, Southern (down 28.3 percent); Puerto Rico (down 21.3 percent); and Hawaii (down 17.6 percent). These declines were largely the result of reductions in the number of land condemnation, real property, and U.S. contract cases filed, respectively. More detailed data on the number and type of civil cases filed in the district courts is provided in Appendix Tables C-2 and C-3.

Civil Filings by Origin

Most of the civil cases filed in the district courts during any given period are original filings. During the twelve month period ended June 30, 1981, original filings accounted for 159,172 cases, or 88.1 percent of total filings. This compares with 88.5 percent a year ago. Removals from state courts and reopened cases continued to increase while remands from the courts of appeals and transfers both declined. Appeals to district judges from magistrate judgments, filed pursuant to the Federal Magistrate Act of 1979, totaled 34 cases. A summary of civil filings, by origin, during each of the twelve month periods ended June 30, 1975 through 1981 can be found in Table 16.

CHART C

EXPLANATION OF PROFILES FOR UNITED STATES DISTRICT COURTS

*OVERALL WORKLOAD STATISTICS	Filings		TOTAL NUMBER OF DISTRICT COURT CASES WHICH WERE (Exclusive of all misdemeanor criminal cases for 1980 and 1981 and all minor and petty offenses for 1976-1979)	Filed during the year, including transfers
	Terminations			Terminated during the year
	Pending			Pending at the end of the year
	Percent Change in Total Filings – Current Year	Over Last Year ▶		Percentage change in total filings – current year over previous
		Over Earlier Years ▶		Percentage change in total filings – current year over two, three, four and five years ago
Number of Judgeships				Authorized Judgeships (Does not include senior judges)
Vacant Judgeship Months				Number of months during profile year that an authorized judgeship was not filled
*ACTIONS PER JUDGESHIP	FILINGS	Total	ALL FIGURES IN THIS SECTION ARE OBTAINED BY DIVIDING THE TOTAL STATISTICS FOR THE COURT BY THE NUMBER OF AUTHORIZED JUDGESHIPS. Excludes all misdemeanor criminal cases for 1980 and 1981 and all minor and petty offense criminal cases for 1976-1979	Total civil and criminal cases filed
		Civil		Includes all civil cases filed
		Criminal		Includes all criminal cases filed whether by indictment, information, or transfer
	Pending Cases			Total pending cases at the end of the year
	Weighted Filings*			This figure is a mathematical adjustment of filings which gives heavier count to cases known to be of a more difficult and time consuming nature
	Terminations			Includes all terminated cases, civil & criminal, tried and not tried, disposed of during the year
	Trials Completed			Total trials completed, including evidentiary-trials, hearings on temporary restraining orders and preliminary injunctions
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal		For all criminal defendants and all civil cases except land condemnation, prisoner petitions, and deportation reviews, terminated during the year whether by trial or other disposition, this figure shows the time interval in months for the middle (median) case. For all criminal defendants time is computed from the filing date to either the sentencing date or the dismissal/acquittal date. When the District had less than 25 terminations the median case was not computed.
		Civil		
	From Issue to Trial (Civil Only)			For civil cases, except land condemnation, going to a trial during profile years, this figure shows the time interval in months for the middle (median) case. Time is computed from the date the answer or response is filed to the date trial begins.
OTHER	Number (and %) of Civil Cases Over 3 Years Old			Total number of civil cases, except land condemnation, pending three years or more as of the end of the year and the percentage these same cases represent of total civil pending caseload.
	Triable Defendants* in Pending Criminal Cases Number (and %)			Excludes those defendants who were awaiting sentence, committed for observation and study, physically or mentally incompetent to stand trial, awaiting trial on another charge, or fugitives. All other defendants are considered triable.
	Juror Usage Index			The number of jurors available per jury trial day
	% of Jurors Not Serving			Percentage of juror attendance days in which jurors did not serve on any actual trials

*See Page 129.

NATURE OF SUIT AND OFFENSE CATEGORIES

CASE CLASS				
CIVIL	A - Social Security B - Recovery of Overpayments and Enforcement of Judgments C - Prisoner Petitions D - Forfeitures and Penalties and Tax Suits	E - Real Property F - Labor Suits G - Contracts H - Torts	I - Copyright, Patents, and Trademark J - Civil Rights K - Antitrust	L - All Other Civil Cases
CRIMINAL (Felonies only. Excludes transfers.)	A - Immigration B - Embezzlement C - Auto Theft D - Weapons and Firearms	E - Liquor, Internal Revenue F - Burglary and Larceny G - Marihuana and Controlled Substances H - Narcotics	I - Forgery and Counterfeiting J - Fraud K - Homicide, Robbery, and Assault	L - All Other Criminal Cases

WHAT THE DISTRICT'S NUMERICAL STANDINGS MEAN	These show where an individual district court stands in relation to other district courts in the circuit and in the country. All "workload" statistics are ranked in descending order (highest value receives rank of 1) and all other statistics are ranked in ascending order (lowest value is ranked first). In some categories fewer than 95 courts are ranked because the information was not available for all districts.

⬆ VERTICAL ROW OF NUMBERS IN RIGHT MARGIN

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United States District Courts—National Judicial Workload Profile

			ALL DISTRICT COURTS					
			1981	1980	1979	1978	1977	1976
OVERALL WORKLOAD STATISTICS	Filings*		201,387	188,487	177,647*	166,447	163,492	166,627
	Terminations		198,172	180,245	167,814*	154,974	152,865	149,720
	Pending		202,283	199,019	191,091*	181,217	169,744	159,085
	Percent Change in Total Filings – Current Year	Over Last Year ▶		6.8				
		Over Earlier Years ▶			13.4	21.0	23.2	20.9
	Number of Judgeships		516	516	516	399	398	399
	Vacant Judgeship Months		414.5	956.2	1,021.0	272.4	234.4	240.6
ACTIONS PER JUDGESHIP	FILINGS	Total	390	365	344	417	411	418
		Civil	350	327	299	348	328	328
		Criminal	40	38	45	69	83	90
	Pending Cases		392	386	370	454	426	399
	Weighted Filings		390	353	344	428	422	432
	Terminations		384	349	325	388	384	375
	Trials Completed		41	38	36	47	47	49
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	3.8	3.7	3.7	3.2	3.7	3.4
		Civil	9	8	9	10	9	9
	From Issue to Trial (Civil Only)		14	15	14	13	12	11
OTHER	Number (and %) of Civil Cases Over 3 Years Old		15,275 (8.4)	20,592 (11.7)	19,089 (11.5)	16,054 (10.2)	11,835 (7.9)	9,414 (6.9)
	Triable Defendants in Pending Criminal Cases Number (and %)		7,882 39.2	7,812 (40.8)	7,176 (37.6)	8,708 (42.7)	10,684 (46.5)	11,469 (43.9)
	Juror Usage Index		18.23	18.83	19.60	19.51	19.55	19.73
	% of Jurors Not Serving		38.9	39.1	40.8	39.5	39.6	39.7

* revised

1981 CIVIL AND CRIMINAL FILINGS BY NATURE OF SUIT AND OFFENSE

pe of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	180,576	9,780	18,150	27,711	6,893	8,887	9,300	33,009	33,767	4,027	15,419	1,352	12,281
Criminal*	20,011	1,857	1,484	297	1,257	27	1,965	1,462	1,695	1,771	3,490	2,027	2,679

Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.

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1981

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

TENNESSEE WESTERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN	
			1981	1980	1979	1978	1977	1976	U.S.	Circui
OVERALL WORKLOAD STATISTICS	Filings*		1,380	1,114	1,223	1,039	1,025	890		
	Terminations		1,112	1,014	1,208	1,134	743	887		
	Pending		1,371	1,102	1,005	990	1,085	803		
	Percent Change in Total Filings - Current Year	Over Last Year ▶		23.9					14	5
		Over Earlier Years ▶			12.8	32.8	34.6	55.1	12	1
Number of Judgeships			3	3	3	3	3	3		
Vacant Judgeship Months			.0	7.7	.0	.0	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	460	371	408	346	342	297	19	3
		Civil	379	290	336	274	281	240	35	5
		Criminal	81	81	72	72	61	57	5	1
	Pending Cases		457	367	335	330	362	268	30	5
	Weighted Filings**		456	417	416	389	393	354	21	4
	Terminations		371	338	403	378	248	296	48	7
	Trials Completed		71	68	87	70	57	67	3	1
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	5.4	5.4	6.0	6.9	6.8	5.3	85	9
		Civil	9	9	9	11	9	9	51	6
	From Issue to Trial (Civil Only)		11	12	14	10	10	10	14	2
OTHER	Number (and %) of Civil Cases Over 3 Years Old		77 (6.5)	63 (6.7)	61 (7.2)	52 (6.6)	47 (5.3)	38 (5.9)		
	Triable Defendants** in Pending Criminal Cases Number (and %)		111 (44.4)	195 (84.8)	92 (42.4)	152 (50.8)	169 (52.6)	137 (47.4)		
	Juror Usage Index		17.59	18.13	17.30	16.87	17.26	17.07	41	5
	% of Jurors Not Serving		32.2	30.3	34.3	31.7	30.9	30.0	30	2

FOR NATIONAL PROFILE AND EXPLANATION OF NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW—OPEN FOLDOUT AT BACK COVER

1981 CIVIL AND CRIMINAL FILINGS BY NATURE OF SUIT AND OFFENSE

Type of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1137	64	163	256	14	23	72	141	163	16	158	5	62
Criminal*	232	1	16	3	8	-	43	11	4	38	75	6	27

*Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 129.

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Mr. SHORT [presiding]. Thank you.

Ms. Smith, would you proceed, please?

We will have the 5-minute limitation and the full statements will be placed in the record.

TESTIMONY OF MS. MAXINE SMITH, EXECUTIVE SECRETARY, NAACP, MEMPHIS, TENN.; N. T. BROTHER GREENE, CYPRESS HEALTH AND SAFETY COMMITTEE, MEMPHIS, TENN.; AND THOMAS M. DANIEL, ATTORNEY, MEMPHIS, TENN.

Ms. SMITH. Mr. Chairman and members of the committee, I am Maxine A. Smith, executive secretary of the Memphis branch NAACP. I apologize for being unable to appear on August 4 but I was involved in my husband's reelection for county commissioner, which he won.

I have lived in Memphis all my life with the exception of attending college at Spellman and Middlebury and have served as a member of the board of education of the Memphis city schools since 1971. I am also a board member of the NAACP special contribution fund.

This is a repeat performance for me, as I testified against the nomination of Judge Wellford to the sixth circuit in 1976. Since that time my opposition to the elevation of Judge Wellford has intensified as his insensitivity to the legal rights of black people has continued. I have furnished the committee a copy of my 1976 testimony, so today I will review Judge Wellford's record since 1976 and his unfitness to serve on the Sixth Circuit Court of Appeals.

Judge Wellford has announced that he has withdrawn his membership for the Memphis Country Club some months ago. I do not perceive this move as a change in Judge Wellford's attitudes toward racial equality, rather it was simply an expedient political step to deflect dissent on his nomination. Unlike his colleague on the bench in Memphis, Hon. Odell Horton, who resigned from the Memphis Rotary Club when the national organization refused to allow women to become members, Judge Wellford did not recognize any impropriety in his Memphis Country Club membership when it was first raised before this committee in 1976 and only resigned when his name was submitted to President Reagan by Senator Baker this spring. If there was any doubt that the Memphis Country Club has a practice of excluding blacks and Jews from its membership, this was dispelled by a story in the November 5, 1981, issue of the Commercial Appeal entitled "Country Clubs Pose Solid Bias Front." The Memphis Country Club not only has no black or Jewish members, blacks are discouraged from being guests on the club premises. Women may join only under a special "ladies membership" and are not allowed a vote in club affairs. For a Federal district judge to be a member of a social organization where his fellow judge Odell Horton could not be his guest because of his skin color is an insult to our Federal system of justice.

Judge Wellford has also manifested his complete disregard for the rights of black people both judicially and extrajudicially. I am personally acquainted with three recent examples:

One. The Memphis Branch NAACP conducted a thorough investigation of racially discriminatory activities at the Memphis Bulk

Mail Center in 1977 and 1978. The Postal Service removed some supervisory personnel because of racial and sexual discrimination. One black employee, A. Martin Butcher, was criminally prosecuted and convicted for taking the phone out of a white supervisor's hand. Judge Wellford wrote a letter to the postmaster, a letter completely unsolicited, stating that Mr. Butcher should be terminated from the Postal Service after he served a 60-day prison sentence.

A copy of Judge Wellford's letter is available for the committee.

Two. On October 13, 1977, Judge Wellford wrote in his judicial capacity to the Chairman of the U. S. Civil Rights Commissic giving his unsolicited opinion about the Commission's stand on affirmative action. In this letter Judge Wellford stated that with blacks representing 2.6 percent of medical students and a lesser percentage of physicians in the United States being black that surely this is some improvement, though it may not be as dramatic as desired.

A Federal judge speaks through his opinions, but Judge Wellford believes that he can use his judicial position to communicate his personal views to governmental agencies. The tragedy for black people in west Tennessee is that Judge Willford continues to preside over cases where affirmative action relief is requested by classes of black citizens who have been victims of racial discrimination. Judge Wellford's courtroom is a hostile forum for the redress of their grievances.

Three. When a vital institution to our business community is sued for racial discrimination, Judge Wellford misuses his solemn trust to the people by delaying his rulings to the detriment of black people. The case of *Equal Employment Opportunity Commission* v. *Union Planters National Bank,* is a striking example of his disregard for the rights of black people. The trial was completed in 1980 and submitted to Judge Wellford for decision which has not been forthcoming to this date.

My request of the Senate today is the same that it was in 1976: Reject the nomination of Harry W. Wellford to the Sixth Circuit Court of Appeals. His fitness for higher judicial office has not improved since the Senate rejected his nomination in 1976. He has continued to show bias in his judicial decisions and his private life. His membership in the Memphis Country Club until the time of this nomination shows the hypocrisy of his public and private opinions. He will only renounce racial discrimination when it is for his personal benefit. Please do not confirm a nomination of a man to the court of appeals who cannot put aside his personal prejudices in the administration of justice.

Thank you for your attention, even though I went over my time.

Mr. SHORT. Thank you very much.

Now we have N. T. Brother Greene. If you would, please.

Mr. GREENE. Thank you, Mr. Chairman.

I would like, for the record, to reflect that William Vann and Ricky Taylor are here with me to support and they are members of the Cyprus Health and Safety Committee.

Mr. Chairman, members of the U.S. Senate Judiciary Committee, my name is Brother Greene. I am spokesman from the Cypress Health and Safety Committee of Memphis, Tenn.

First, Mr. Chairman, I want to, on behalf of our committee and others, express our appreciation to you for continuing this hearing as I had requested through your staff last week. That hearing simply did not afford the citizens of Michigan, Ohio, Kentucky or Tennessee adequate notice of that public hearing. We believe that the senior Senator from the State of Tennessee, Howard Baker, was deeply involved with certain Senate Judiciary Committee staff members to try and railroad Judge Harry W. Wellford's nomination through the Senate quickly.

Mr. **Short**. Let me interrupt you and ask you, Mr. Greene, do you have any specific names that you are concerned with?

Mr. **Greene**. I will be glad to respond to all questions as soon as I am finished with the statement.

Mr. **Short**. But you do not have any at this time. Is that correct?

Mr. **Greene**. So that certain citizen groups would not have a chance to present their legitimate and well founded objections to this nomination. Thank God, Mr. Chairman, somehow our objections reached you and you delayed this hearing until today. We appreciate that.

On September 2, 1976, we appeared before this committee regarding this same nomination. We opposed the nomination then and we are opposed to this nomination today.

There are numerous reasons why we are so strongly against the nomination of Harry W. Wellford. I will specifically refer to only a couple of those reasons.

One. Judge Wellford tried to "protect" his former neighbors by dismissing our lawsuit in 1975 to keep a public street, West Drive, open for public use. Certain white Hein Park residents had claimed that they wanted that public street closed because a dog was killed. That was a lie, the real reason was to prevent the black schoolchildren of the adjacent neighborhood from walking through that street on their way to school or to the zoo in Overton Park.

Judge Wellford dismissed our lawsuit, with prejudice, after a superficial hearing of that matter. Clearly his motive was to try and accommodate his former neighbors because he once lived on that street, West Drive, in Hein Park.

The actions of Judge Wellford in this matter was a fundamental violation of all legal ethical standards, and he was also wrong on the law. The appeals court later reversed his decision.

Two. In another case called the Cyprus sewage case, he refused to remove himself from that case or transfer it to another judge as he was asked to do by the petitioners. Instead, he made a ruling in favor of the city mayor and other officials. In that case, Judge Wellford, on his own initiative, played the role of judge as well as the city's attorney. He took actions on behalf of city officials to benefit their special interests, without them asking him, in violation of our constitutional rights. Their special interest, in this instance, was to sell a piece of public street to private white property owners. Thereby, creating a situation whereby any child who walked across that piece of private property could be jailed for criminal trespass.

There are various other improper actions that the judge is guilty of, including an ex-parte action in a reapportionment case in Madison County, Tenn.

As a matter of fact, one of this Nation's leading newspapers stated on September 9, 1976, regarding this matter:

> The hallmark of Judge Wellford's judicial career is strong and unremitting hostility to the constitutional and statutory claims by minorities for equal justice. He has resisted minority claims under Federal statutes to equal employment opportunities, going so far on occasion as to require the plaintiffs to meet requirements that the statutes and the courts have explicitly invalidated. His position on school desegregation is no better.

That was from the New York Times of that date.

Mr. Chairman, if this Senate committee does not wish to send this nomination back to the President for reconsideration, then the least it can do for the citizens of this Nation, not just for the citizens of the sixth circuit, is to have a special joint House and Senate committee thoroughly investigate the various serious charges made concerning this nominee.

Finally, the junior U.S. Senator from Tennessee, Jim Sasser, set a standard in Tennessee for Federal judicial selection. That standard should be accepted and utilized by Senator Baker regarding this U.S. circuit court vacancy. That standard basically caused the meaningful involvement of various citizen groups in the screening of candidates for Federal court positions. A list of three candidates would be submitted to the U.S. Senators, then the Senators would select one of the three persons to recommend to the President for nomination. If this procedure were used in this instance, and we strongly urge its use, we are quite certain that such a panel would insure that at least two of the three candidates be women and that one of the three persons be a black woman. There is clearly a need for a woman and a black woman on the Sixth U.S. Circuit Court panel. There are, at this time, no women, either black or white, on the panel of circuit judges for the sixth circuit.

Thank you Mr. Chairman, for allowing us to be heard today. I will be glad to answer any questions you may have.

One footnote, Mr. Chairman. The Memphis City Council by unanimous vote passed a resolution directed to the Judiciary Committee regarding Judge Wellford's nomination and I would like for that resolution to be made a part of the record; also the New York Times editorial I read to you.

Mr. SHORT. When was the resolution passed?

Mr. GREENE. What date?

Mr. SHORT. Yes, please.

Mr. GREENE. One second, sir.

Mr. SHORT. That is not a recent resolution?

Mr. GREENE. No. It was passed in 1976, addressed to the Judiciary Committee regarding this nomination. I have it here.

Mr. SHORT. Yes, sir. I understand.

Mr. GREENE. I would like to make it available to you, if you need it.

Mr. SHORT. Without objection, it will be made a part of the record and kept in committee files.

You can find that later.

Mr. GREENE. I will find it and submit it to you after this hearing.

Mr. SHORT. Thank you very much.

Mr. Tom Daniel, attorney from Memphis, please.

Mr. DANIEL. Mr. Chairman and members of the committee, I am Thomas M. Daniel of Memphis, Tenn. I am a lawyer, admitted to the bar in Tennessee, and am admitted to the practice in and have practiced in the U.S. District Court for the Western District of Tennessee, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court. I am a partner in the law firm of Ratner & Sugarmon.

A large part of my practice and the practice of my firm is in the Federal courts, and I, as well as other members of my firm have had numerous cases in Judge Harry W. Wellford's court. As a result of this experience, I believe that I have some knowledge of Judge Wellford's performance as a Federal district judge and his qualifications to be a court of appeals judge.

I appear before you to raise three issues which this committee should seriously consider or investigate before voting to confirm Judge Wellford:

One. The recent events concerning the reduction of sentence of a Congressman's brother;

Two. Judge Wellford's hostility to civil rights claimants as demonstrated by his record;

Three. Judge Wellford's qualifications to be an appellate judge.

In 1976, Judge Wellford was nominated to the Court of Appeals for the Sixth Circuit, but after substantial opposition from civil rights groups and the threatened filibuster of a Senator, the nomination was never voted out of this committee. The most influential opponent of Judge Wellford was Congressman Harold Ford of Memphis.

Within days after Judge Wellford was nominated this year, and over the strenuous objection of the Federal prosecutor, Judge Wellford reduced the prison sentence of former State Representative Emmitt Ford, the brother of Congressman Ford, from 20 months to 8 months. This reduction in sentence came after Judge Wellford previously had denied a motion to reduce Representative Ford's sentence in March 1982, and after what the assistant U.S. attorney who prosecuted the case termed a "highly unusual" meeting in chambers between Judge Wellford and Congressman Ford and John Jay Hooker, Jr., an influential politician and businessman in Tennessee. According to Judge Wellford, his decision was based upon "dozens and dozens of communications from church, civil, political, and legal and other sources." However, Judge Wellford has refused to release those letters to the Federal prosecutor or anyone else.

The events surrounding Judge Wellford's decision to reduce the sentence of the Congressman's brother, only days before this committee's confirmation hearings, raises important questions concerning the propriety of his actions.

Further investigation may reveal that Judge Wellford did not act improperly, but as stated in an editorial in the Memphis Commercial Appeal:

> Judge Wellford, through the untimeliness of his actions, has fueled a public perception of political influence that could have been avoided had he but recused himself from the case.

Judge Wellford's actions have created a public furor in Memphis. I have attached to my statement copies of recent newspaper articles and letters to the editor concerning this issue.

Mr. SHORT. They will be entered into the record, without objection.

Mr. DANIEL. Because of the public perception of impropriety brought about by Judge Wellford's actions, I respectfully submit that this committee should launch an investigation of the events surrounding the sentence reduction of former State Representative Emmitt Ford. It is incumbent upon this committee to assure itself that Judge Wellford did nothing improper or unethical before confirming his nomination. Otherwise the public perception that judges are appointed because of who they know rather than what they know will not easily be dispelled.

There are several specific actions this committee could take in this regard:

First, the committee could order a copy of the transcript of the in-chambers conference between Judge Wellford, Congressman Ford, and John J. Hooker, Jr.

Second, the committee could subpena the assistant U.S. attorney who prosecuted Emmitt Ford to learn more details of the events surrounding the reduction of sentence.

Third, the committee should ask Judge Wellford why he refused to show the letters on which he based his decision to reduce sentence to the Federal prosecutor and determine whether Judge Wellford's action in this regard violated the "Code of Judicial Conduct" or other applicable rules or statutes.

The second issue which I believe this committee should carefully evaluate before confirming Judge Wellford is his record in the area of civil rights.

When I file a civil rights case and it gets assigned to Judge Wellford, I can usually predict the outcome before anything happens on the case: I lose. This perception is based on my own experience in past cases and is supported by an examination of Judge Wellford's record in civil rights cases.

For example, I have compiled a list of all reported civil rights cases appealed to the sixth circuit from Judge Wellford's court from the time he assumed the bench until 1982. Of course, this does not include all of his civil rights cases, because some are not reported and some were not appealed to the court of appeals. However, of the 39 reported cases that I found, Judge Wellford ruled in favor of the plaintiff only five times. And in the five cases in which Judge Wellford ruled in favor of the plaintiff, four were appealed by the plaintiffs because of the inadequacy of the relief granted.

Mr. SHORT. Excuse me. Are you offering that for insertion into the record?

Mr. DANIEL. Yes.

Mr. SHORT. Without objection, so ordered.

Mr. DANIEL. When Judge Wellford's public civil rights record is viewed in conjunction with his private actions regarding civil rights, one can only assume that Judge Wellford is insensitive to the rights of minority and other civil rights claimants. For example, Judge Wellford, after becoming a Federal judge, joined a private country club that denies membership to blacks and Jews.

When this fact was raised in Judge Wellford's confirmation hearings in 1976, he nevertheless refused to resign. Approximately 6 years later and, according to Judge Wellford, at about the same time that he was recommended to be nominated to the sixth circuit again, he finally resigned from the all-white Memphis Country Club.

In the few cases in which the judge has ruled for plaintiffs he has done so to quote Judge Wellford, "most reluctantly," "with particular regret," and "regretting the necessity under present Supreme Court standards." For example, in a suit brought against the city of Millington, Tenn., challenging its operation of racially segregated public housing projects, although Judge Wellford found that the segregation was unlawful he refused to order any injunction to dismantle the dual system.

But most of the time he simply rules against civil rights claimants. He has thrown almost every procedural roadblock imaginable into the Equal Employment Opportunity Commission's efforts to end employment discrimination.

I have cited two cases in support of that.

He consistently rules against individuals complaining of discriminatory employment practices, unconstitutional government actions, and other civil rights violations.

The third issue that I raise concerning Judge Wellford is whether he is qualified to be an appellate judge.

I will not read that because of my time, and I will submit the rest for the record.

Mr. SHORT. Senator Thurmond appreciates your appearance and we will now stand adjourned.

Mr. GREENE. I want the record to reflect the fact that I filed the resolution as well as a copy of my statement to the Committee, to be made a part of the record.

Mr. SHORT. Thank you very much, Mr. Greene.

[The prepared statements and submissions of Ms. Smith, Brother Greene, and Mr. David follow:]

PREPARED STATEMENT OF MAXINE A. SMITH ON BEHALF OF THE MEMPHIS BRANCH NAACP ON THE NOMINATION OF HARRY W. WELLFORD TO BE A JUDGE ON THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Mr. Chairman and members of the committee. I am Maxine A. Smith, Executive Secretary of the Memphis Branch NAACP. I apologize for being unable to appear on August 4 but I was involved in my husband's relection for county commissioner which he won.

I have lived in Memphis all my life with the exception of attending College at Spellman and Middlebury and have served as a member of the Board of Education of the Memphis City Schools since 1971. I am also a board member of the NAACP Special Contribution Fund.

This is a repeat performance for me, as I testified against the nomination of Judge Wellford to the Sixth Circuit in 1976. Since that time my opposition to the elevation of Judge Wellford has intensified as his insensitivity to the legal rights of black people has continued. I have furnished the committee a copy of my 1976 testimony, so today I will review Judge Wellford's record since 1976 and his unfitness to serve on the Sixth Circuit Court of Appeals.

Judge Wellford has announced that he has withdrawn his membership for the Memphis Country Club some months ago. I do not perceive this move as a change in Judge Wellford's attitudes toward racial equality, rather it was simply an expedient political step to deflect dissent on his nomination. Unlike his colleague on the bench in Memphis, the Honorable Odell Horton, who resigned from the Memphis Rotary Club when the national organization refused to allow women to become members, Judge Wellford did not recognize any impropriety in his Memphis Country Club membership when it was first raised before this Committee in 1976 and only resigned when his name was submitted to President Reagan by Senator Baker this Spring. If there was any doubt that the Memphis Country Club has a practice of excluding blacks and Jews from its membership, this was dispelled by a story in the November 5, 1981 issue of the Commercial Appeal entitled "Country Clubs Pose Solid Bias Front." The Memphis Country Club not only has no black or Jewish members; blacks are discouraged from being guests on the club premises. Women may join only under a special "ladies membership" and are not allowed a vote in club affairs. For a federal district judge to be a member of social organization where his fellow judge Odell Horton could not be his guest because of his skin color is an insult to our federal system of justice.

Judge Wellford has also manifested his complete disregard for the rights of black people both judicially and extra-judicially. I am personally acquainted with three recent examples:

1. The Memphis Branch NAACP conducted a thorough investigation of racially discriminatory activities at the Memphis Bulk Mail Center in 1977 and 1978. The Postal Service removed some supervisory personnel because of racial and sexual discrimination. One black employee, A. Martin Butcher, was criminally prosecuted and convicted for taking the phone out of a white supervisor's hand. Judge Wellford wrote a letter to the Postmaster, a letter completely unsolicited, stating that Mr. Butcher should be terminated from the Postal Service, even though Mr. Butcher had a pending appeal before the U.S. Civil Service Commission. Fortunately, Mr. Butcher was reinstated by the Postal Service after he served a 60-day prison sentence. A copy of Judge Wellford's letter is available for the Committee.

2. On October 13, 1977, Judge Wellford wrote in his judicial capacity to the Chairman of the U.S. Civil Rights Commission giving his unsolicited opinion about the Commission's stand on affirmative action. In this letter Judge Wellford stated that with blacks representing 2.6 percent of medical students and a lesser percentage of physicians in the United States being black, that "[s]urely this is some improvement, though it may not be as dramatic as desired." A federal judge speaks through his opinions, but Judge Wellford believes that he can use his judicial position to communicate his personal views to governmental agencies. The tragedy for black people in West Tennessee is that Judge Wellford continues to preside over cases where affirmative action relief is requested by classes of black citizens who have been victims of racial discrimination—Judge Wellford's courtroom is a hostile forum for the redress of their grievances.

3. When a vital institution to our business community is sued for racial discrimination, Judge Wellford misuses his solemn trust to the people be delaying his rulings to the detriment of black people. The case of the *Equal Employment Opportunity Commission* v. *Union Planters National Bank* is a striking example of his disregard for the rights of black people. Filed in 1973, the trial and post-trial briefing in this class action case was completed in July, 1980 and submitted to Judge Wellford for a decision. As of today, over two years later, no decision has been forthcoming. What kind of federal judge would take two years or more to decide a case that has been pending for nine years—certainly not a judge that should be elevated to review the decisions of his district court colleagues.

My request of the Senate today is the same that it was in 1976—reject the nomination of Harry W. Wellford to the Sixth Circuit Court of Appeals. His fitness for higher judicial office has not improved since the Senate rejected his nomination in 1976. He has continued to show bias in his judicial decisions in the Country Club until the time of this nomination shows the hypocrisy of his public and private opinions—he will only renounce racial discrimination when it is for his personal benefit. Please do not confirm a nomination of a man to the court of appeals who cannot put aside his personal prejudices in the administration of justice. Thank you for your attention, even though I went over my time.

PREPARED STATEMENT OF N. T. BROTHER GREENE

Mr. Chairman, members of the U.S. Senate Judiciary Committee, my name is Brother Greene. I am spokesman for the Cypress Health and Safety Committee of Memphis, Tennessee.

First, Mr. Chairman, I want to, on behalf of our committee and others, express our appreciation to you for continuing this hearing as I had requested through your staff last week. That hearing simply did not afford the citizens of Michigan, Ohio, Kentucky or Tennessee adequate notice of that public hearing. We believe that the senior Senator from the State of Tennessee, Howard Baker, was deeply involved with certain Senate Judiciary Committee staff members to try and railroad Judge Harry W. Wellford's nomination through the Senate quickly, so that certain citizen groups would not have a chance to present their legitimate and well founded objections to this nomination. Thank God, Mr. Chairman, somehow our objections reached you and you delayed this hearing until today. We appreciate that.

On September 2, 1976, we appeared before this committee regarding this same nomination. We opposed the nomination then and we are opposed to this nomination today.

There are numerous reasons why we are so strongly against the nomination of Harry W. Wellford. I will specifically refer to only a couple of those reasons:

1. Judge Wellford tried to "protect" his former neighbors by dismissing our lawsuit in 1975 to keep a public street, West Drive, open for public use. Certain white Hein Park residents had claimed that they wanted that public street closed because a dog was killed. That was a lie. The real reason was to prevent the black school children of the adjacent neighborhood from walking through that street on their way to school or to the zoo in Overton Park.

Judge Wellford dismissed our lawsuit, with prejudice, after a superficial hearing of that matter. Clearly his motive was to try and accommodate his former neighbors because he once lived on that street, West Drive, in Hein Park.

The actions of Judge Wellford in this matter was a fundamental violation of all legal ethical standards. He was also wrong on the law. The Appeals Court later reversed his decision.

2. In another case called "The Cypress Sewage Case," he refused to remove himself from that case or transfer it to another Judge as he was asked to do by the petitioners. Instead, he made a ruling in favor of the city mayor and other officials. In that case, Judge Wellford, on his own initiative, played the role of judge as well as the city's attorney. He took actions on behalf of city officials to benefit their special interests, without them asking him, in violation of our constitutional rights. Their special interest, in this instance, was to sell a piece of public street to private white property owners. Thereby, creating a situation whereby any child who walked across that piece of private property could be jailed for criminal trespass.

There are various other improper actions the judge is guilty of, including an exparte action in a reapportionment case in Madison County Tennessee.

As a matter of fact, one of this nation's leading newspapers stated on September 9, 1976 regarding this matter: "The hallmark of (Judge Wellford's) judicial career is strong and unremitting hostility to the constitutional and statutory claims by minorities for equal justice. He has resisted minority claims under Federal statutes to equal employment opportunities, going so far on occasion as to require the plaintiffs to meet requirements that the statutes and the courts have explicitly invalidated. His position on school desegregation is no better."

Mr. Chairman, if this Senate Committee does not wish to send this nomination back to the President for reconsideration, then the least it can do for the citizens of this nation, not just for the citizens of the 6th Circuit, is to have a special joint House and Senate Committee thoroughly investigate the various serious charges made concerning this nominee.

Finally, the junior U.S. Senator from Tennessee, Jim Sasser, set a standard in Tennessee for Federal judical selection. That standard should be accepted and utilized by Senator Baker regarding this U.S. Circuit Court vacancy. That standard basically caused the meaningful involvement of various citizen groups in the screening of candidates for Federal court positions. A list of three candidates would be submitted to the U.S. Senators, then the Senators would select one of the three persons to recommend to the President for nomination. If this proecedure were used in this instance, and we strongly urge its use, we are quite certain that such a panel would insure that at least two of the three candidates be women and that one of the three persons be a black woman. There is clearly a need for a woman and a black woman on the 6th U.S. Circuit court panel. There are, at this time, no women, either black or white on the panel of circuit judges for the 6th Circuit.

Thank you Mr. Chairman for allowing us to be heard today. I will be glad to answer any questions you may have.

PREPARED STATEMENT OF THOMAS M. DANIEL, REGARDING NOMINATION OF HARRY W. WELLFORD TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Mr. Chairman and members of the committee, I am Thomas M. Daniel of Memphis, Tennessee. I am a lawyer, admitted to the bar in Tennessee, and am admitted to practice in and have practiced in the United States District Court for the Western District of Tennessee, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. I am a partner in the law firm of Ratner and Sugarmon.

A large part of my practice, and the practice of my firm is in the federal courts, and I, as well as other members of my firm have had numerous cases in Judge Harry W. Wellford's court. As a result of this experience, I believe that I have some knowledge of Judge Wellford's performance as a federal district judge and his qualifications to be a court of appeals judge.

I appear before you to raise three issues which this Committee should seriously consider or investigate before voting to confirm Judge Wellford: (1) the recent events concerning the reduction of sentence of a Congressman's brother; (2) Judge Wellford's hostility to civil rights claimants as demonstrated by his record; and (3) Judge Wellford's qualifications to be an appellate judge.

In 1976, Judge Wellford was nominated to the Court of Appeals for the Sixth Circuit, but after substantial opposition from civil rights groups and the threatened filibuster of a Senator, the nomination was never voted out of this Committee. The most influential opponent of Judge Wellford was Congressman Harold Ford of Memphis. Within days after Judge Wellford was nominated this year, and over the strenuous objection of the federal prosecutor, Judge Wellford reduced the prison sentence of former state Representative Emmitt Ford, the brother of Congressman Ford from 20 months to 8 months. This reduction in sentence came after Judge Wellford previously had denied a motion to reduce Representative Ford's sentence in March, 1982, and after what the Assistant U.S. Attorney who prosecuted the case termed a "highly unusual" meeting in chambers between Judge Wellford and Congressman Ford and John Jay Hooker, Jr., an influential politician and businessman in Tennessee. According to Judge Wellford, his decision was based upon "dozens and dozens of communications from church, civil, political, and legal and other sources . . ." However, Judge Wellford has refused to disclose those letters to the Federal prosecutor or anyone else.

The events surrounding Judge Wellford's decision to reduce the sentence of the Congressman's brother, only days before this Committee's confirmation hearings, raises important questions concerning the propriety of his actions.

Further investigation may reveal that Judge Wellford did not act improperly, but as stated in an editorial in the Memphis Commercial Appeal:

"[Judge] Wellford, through the untimeliness of his actions, has fueled a public perception of political influence that could have been avoided had he but recused himself from the case."

Judge Wellford's actions have created a public furor in Memphis. I have attached to my statement copies of recent newspaper articles and letters to the editor concerning this issue.

Because of the public perception of impropriety brought about by Judge Wellford's actions, I respectfully submit that this Committee should launch an investigation of the events surrounding the sentence reduction of former state representative Emmitt Ford. It is incumbent upon this Committee to assure itself that Judge Wellford did nothing improper or unethical before confirming his nomination. Otherwise the public perception that Judges are appointed because of who they know rather than what they know will not easily be dispelled.

There are several specific actions this Committee could take in this regard:

(1) The Committee could order a copy of the transcript of the in-chambers conference between Judge Wellford, Congressman Ford, and John J. Hooker, Jr.; (2) The Committee could subpoena the Assistant U.S. Attorney who prosecuted Emmitt Ford to learn more details of the events surrounding the reduction of sentence; (3) The Committee should ask Judge Wellford why he refused to show the letters on which he based his decision to reduce sentence to the Federal Prosecutor, and determine whether Judge Wellford's action in this regard violated the Code of Judicial Conduct or other applicable rules or statutes.

The second issue which I believe this Committee should carefully evaluate before confirming Judge Wellford is his record in the area of civil rights.

When I file a civil rights case and it gets assigned to Judge Wellford, I can usually predict the outcome before anything happens on the case—I lose. This perception is based on my own experience in past cases and is supported by an examination of Judge Wellford's record in civil rights cases. For example, I have compiled a list of all reported civil rights cases appealed to the Sixth Circuit from Judge Wellford's

Court from the time he assumed the Bench until 1982.[1] Of course, this does not include all of his civil rights cases, because some are not reported and some were not appealed to the Court of Appeals. However, of the 39 reported cases that I found, Judge Wellford ruled in favor of the plaintiff only five times. And in the five cases in which Judge Wellford ruled in favor of the plaintiff, four were appealed by the plaintiffs because of the inadequacy of the relief granted.

When Judge Wellford's public civil rights record is viewed in conjunction with his private actions regarding civil rights, one can only assume that Judge Wellford is insensitive to the rights of minority and other civil rights claimants. For example, Judge Wellford, after becoming a federal judge, joined a private country club that denies membership to Blacks and Jews. When this fact was raised in Judge Wellford's confirmation hearings in 1976, he nevertheless refused to resign. Approximately six years later and, according to Judge Wellford, at about the same time that he was recommended to be nominated to the Sixth Circuit again, he finally resigned from the all white Memphis Country Club.

In the few cases in which Judge Wellford has ruled for plaintiffs he has done so to quote Judge Wellford, "most reluctantly," "with particular regret", and "regretting the necessity under present Supreme Court standards." For example, in a suit brought against the City of Millington, Tennessee challenging its operation of racially segregated public housing projects, although Judge Wellford found that the segregation was unlawful he refused to order any injunction to dismantle the dual system.

But most of the time he simply rules against civil rights claimants. He has thrown almost every procedural roadblock imaginable into the Equal Employment Opportunity Commission's efforts to end employment discrimination. He consistently rules against individuals complaining of discriminating employment practices, unconstitutional goverment actions, and other civil rights violations.

The third issue that I raise concerning Judge Wellford is whether he is qualified to be an appellate judge.

Of course, I am aware of the difficulty of demonstrating in a totally objective manner that a judge is not qualified to sit on the Court of Appeals. But there is considerable objective evidence of Judge Wellford's lack of qualifications. In addition, to Judge Wellford's record in civil rights cases, I have examined a number of Judge Wellford's non-civil rights cases. Judge Wellford has been reversed in a number of cases because his findings of fact were clearly erroneous, insufficient, or confusing or his legal reasoning was plainly wrong. In a case decided in May by the Sixth Circuit, Judge Wellford's grant of a preliminary injunction was reversed because he had only heard testimony from one side in the case. *Securities and Exchange Commission* v. *G. Weeks Securities, Inc.*, No. 80-1013, 80-1145 (6th Cir. May 19, 1982), (Exhibit 3). And in *Memphis American Federation of Teachers* v. *Board of Education of Memphis City Schools* 534 F.2d 699 (6th Cir. 1976), Judge Wellford expressed doubt that the Court had jurisdiction, but without resolving the jurisdictional issue, decided the merits of the case. Again, Judge Wellford was reversed by the Court of Appeals holding it was improper to decide the merits of the case without a finding that the court had jurisdiction of the claim. In *United States* v. *Young*, 472 F.2d 628 (6th Cir. 1972), Judge Wellford, sitting by designation on the Court of Appeals, wrote a dissenting opinion that is inarticulate and virtually incomprehensible. In *Mitchell* v. *Tennessee*, 351 F.Supp. 846 (W.D. Tenn. 1972), Judge Wellford proposes to decide a particular issue by counting the number of judges who have ruled pro and con on the question rather than following the majority opinion of the Supreme Court.

I have raised a number of issues today which I believe merit your careful consideratin and investigation. I appreciate the opportunity to appear before you and if I can be of further assistance to the Committee, please feel free to call on me

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[1] These include cases in the following areas: employment discrimination, constitutional claims, and habeas corpus petitions. A copy of a summary of these cases as well as others is attached hereto as Exhibit 2.

EXHIBIT 1

[From the Commercial Appeal, June 30, 1982]

WELLFORD QUITS CLUB MEMBERSHIP THAT CAUSED 1976 CONTROVERSY

U.S. Dist. Judge Harry W. Wellford, seeking a bid to the Sixth Circuit Court of Appeals, said yesterday he had resigned a club membership which in 1976 could have cost him the appeals court seat.

Wellford said that at about the same time he had been recommended to the appeals court seat by Sen. Howard Baker (R-Tenn.) he resigned from the all-white Memphis Country Club.

In 1976, Wellford lost a bid to the court after a Senate subcommittee refused to vote on his nomination. Several Memphis residents, including U.S. Rep. Harold Ford (D-Memphis), complained about the country club membership, in addition to Wellford's attitudes that they claimed indicated he was "hostile to civil rights."

Wellford was nominated to the court earlier this week by President Reagan. Senate confirmation hearings are expected soon.

Wellford Wednesday reduced the 20-month prison sentence of former state Rep. Emmitt Ford to 8 months. Ford, the brother of Harold Ford, was sentenced to the prison after he was convicted of insurance fraud charges.

After the conviction, Ford opened a meat cutting business. His prison term was reduced after attorneys argued that the business was suffering in his absence.

[From the Press-Scimitar, July 28, 1982]

WELLFORD GETS REAGAN'S CALL

(By Henry Bailey)

There isn't a better way for a federal judge to learn of a potential promotion to the appeals bench than to get a call from the U.S. president himself.

U.S. District Judge Harry Wellford is happy he did—but he's reserving his cheers for later.

"I don't know what happens at this point," Wellford said. "I am presuming nothing about any change in my status until, unless and if the Senate acts on my nomination. I'm sort of in their hands at this point.

"But I was pleased and surprised to get a call from the president himself—I didn't realize that procedure was involved."

The 57-year-old judge was told by President Reagan that he would be nominated to fill the vacancy on the U.S. 6th Circuit Court of Appeals created by Judge Bailey Brown's retirement last month. Senate Majority Leader Howard Baker earlier announced his support for Wellford, who managed the Republican lawmaker's 1964 and 1966 campaigns in West Tennessee.

Despite such support, Wellford's reserve is hardly a surprise; in his first bid for the Cincinnati-based appeals court in 1976, his nomination by President Gerald Ford was scuttled in the Senate Judiciary Committee after Sen. James Abourezk, a South Dakota Democrat, threatened a filibuster.

With Republicans now in control of the Senate and many non-conservatives such as Abourezk gone, Wellford's nomination appears to stand a better chance of success, even though criticism of Wellford's performance continues from some Memphis area civil rights leaders.

If Wellford was customarily demure on White House announcement, Baker supplied enough enthusiasm for both. "Judge Wellford has established a most distinguished record of judicial service to the people of Tennessee, and I feel he has the skill and experience needed to benefit this most important position."

"I am sure that the Senate will move expeditiously with its confirmation," Baker said. No date has been set for a hearing, however.

Wellford said he intended to contact Baker's office and that of the administrative assistant to the Judiciary Committee "to find out approximately what the time schedule will be."

He expressed pleasure at having Baker's support, but noted that Baker is not a member of the committee that will decide whether to recommend confirmation by the full Senate. Added to that is the election-year rush, which promises to complicate the Senate's late summer and fall schedule, he said.

Wellford, who was named by President Richard Nixon to the federal judiciary in 1971, received his law degree from Vanderbilt and is a Navy veteran of World War

II. He stays trim with tennis and recently has taken up the "frustrating" game of golf.

[From the Commercial Appeal, July 29, 1982]

Wellford Cuts Year Off Ford Sentence

(By Louis Graham)

U.S. Dist. Judge Harry W. Wellford yesterday reduced from 20 months to 8 months the federal prison term of former state Rep. Emmitt Ford, who according to federal officials, could be back at his Memphis meat cutting business within days.

Ford, originally sentenced to 20 months at Maxwell Air force Base Prison in Montgomery, Ala., after being convicted on insurance fraud charges, got the reduced sentence after his attorneys argued the family business was suffering in his absence.

During several months of level maneuverng aimed at obtaining the reduced sentence, Wellford received "dozens upon dozens" of pleas from church, civic and political leaders.

Among those was a letter from Ford's brother, U.S. Rep. Harold Ford of Memphis, who urged Wellford to act with leniency.

Reached at his Memphis campaign headquarters, Harold Ford said, "I would think that the judge acted in a proper manner.

"I don't know of anyone else in this area who has served more than six months under similar circumstances" for a similar offense.

U.S. Atty. Hickman Ewing Jr., however, said federal prosecutors were distressed by Ford's early release—a move he and other prosecutors had fought from the outset.

Ewing said "Basically it is the position of this office that we don't think it should be reduced at all. But we're not the judge, we're the advocate of the government and of the people. We are always concerned when there appears to be favorable treatment of public officials."

Wellford, reached in his office yesterday, was hesistant to discuss the matter.

"I won't expand too much on any of it," he said.

"I guess I received dozens upon dozens of communications from church, civic, political and legal and other sources . . . primarily from religious leaders of all different faiths and persuasions.

". . . I don't think it's appropriate to make specific comments about specific cases."

Wellford has refused to provide prosecutors with copies of any of the letters, or identify any of those persons who had written.

Ford, a licensed insurance agent, and his wife, Earline, were convicted in 1980 of a scheme to cheat 29 insurance companies out of benefits on a hit-and-run accident.

Though her husband received a 36-month prison sentence (with all but 20 months suspended), Mrs. Ford received a one-year suspended sentence and was required to do four hours of community service work weekly.

After exhausting the appeal process, Ford began serving his sentence March 23 at Maxwell.

Meanwhile, his wife took over management of the couple's business, Ford's Butcher Block at 4046 Horn Lake Road. Attorneys petitioned Wellford to relieve Mrs. Ford of her commitment of public service, saying she was working long hours to keep the business in operation.

Wellford agreed and eliminated the sentencing provision.

In March, 1982, Ford's attorneys began to file motions aimed at getting the former legislator's sentence reduced. In March, Wellford refused, but then took a similar request under advisement in May.

Asst. U.S. Atty. Dan Clancy, who prosecuted the case, vigorously objected to an early release. In a letter to Wellford, Clancy said, "It cannot be gainsaid how important it is for the court to show the community—as former U.S. Atty. Mike Cody did—that justice is not dictated by position, wealth or influence."

Wellford, however, amended Ford's sentence yesterday, but declined to specify what had changed his mind.

In his three-page order, Wellford said, "The court appreciates the strain imposed upon the defendant's wife and family due to his incarceration; regrettably this occurs in almost every instance where a family man is incarcerated . . .

"He has not, from all indication, been given special attention or favorable treatment by reason of his prominence and having occupied an elective office at the time of the offense."

Under Wellford's ruling:

Ford's sentence will be reduced to 18 months, with 10 months suspended. According to Wellford, the 8 months will be served in a minimum security facility such as Maxwell.

Ford also will face two months in a halfway house where he will be allowed to leave from 6 a.m. to 9 p.m. to operate the family business.

Restitution to the defrauded insurance companies would be required during Ford's two-year probation period. Ewing said that amounted to nearly $60,000.

Though Wellford said the two months in the halfway house would follow eight months at Maxwell, Ewing and other federal officials have interpreted the order differently.

Ewing said it was conceivable that Ford, who has served nearly four months, soon could be released to the halfway house to serve two months. It was possible, Ewing said, that Ford had earned nearly two months of credit for "good time" and time earned through his participation in a prison work program.

Given that, Ewing said, Ford could be moved to the halfway house within days.

Wellford has for the second time in six years been nominated by a president for a seat on the Sixth Circuit Court of Appeals. In 1976, Wellford lost his bid for the seat after Memphis residents argued he was "hostile to civil rights."

At the forefront of the opposition was Harold Ford, who told a Senate subcommittee, "Many community-based civic and legal organizations and numerous individuals have raised questions about Judge Wellford's ability to conduct a judicial proceeding in a fair and impartial matter . . .

"A number of these questions have been raised as a result of his rulings from the bench, others because of his public statements and still others because of his membership in a racially exclusive private club." Ford was referring to Wellford's membership in Memphis Country Club.

[From the Memphis (Tenn.) Press-Scimitar, July 31, 1982]

WELLFORD CALLS MEETING WITH HAROLD FORD "PROPER"

(By Henry Bailey)

U.S. District Judge Harry Wellford said there was nothing improper about an in-chambers meeting he had with U.S. Rep. Harold Ford and another political power broker, attorney-businessman John Jay Hooker, who were seeking a cut in the 20-month prison sentence Wellford ordered for Ford's brother, former state Rep. Emmitt Ford.

"There was a request for such a meeting. Attorneys for both sides also were present at my request, and if I am not mistaken, a court reporter also was present," said Wellford of the meeting in the spring.

He said he consulted the other judges on the federal bench in Memphis and "determined this approach to be the appropriate procedure." Wellford said. "This was the only occasion in which there was any presentation by anyone other than the attorneys connected with this matter."

Hooker, a political ally of the Fords in the past, said he considered the meeting simply a "convenience" for the parties. But the federal prosecutor who attended, Dan Clancy, said he had misgivings about the "highly unusual" meeting but never was asked his opinion.

Harold Ford's support for Wellford's nomination to the 6th U.S. Circuit Court of Appeals would boost the Judge's chances.

However, both the congressman and the judge deny any such arrangements prompted them in their dealings on the Emmitt Ford case. Harold Ford spoke in Senate hearings against Wellford during the judge's unsuccessful bid for promotion in 1976.

The Emmitt Ford sentence session was held not long after Ford began his sentence in March at the Maxwell Air Force Base prison camp near Montgomery, Ala. A jury in Wellford's court had found Ford and his wife Earline guilty on charges they schemed to bilk 29 insurance companies of $60,000 in benefits on a staged auto accident.

The judge earlier this week, bowing to what he said were "numerous communications" from business, civic and religious sources across the city, ordered Ford's prison sentence cut to eight months. Under federal prison guidelines and Wellford's order, Ford could be released almost immediately to work at a family-owned meat market while spending evenings at a Memphis halfway house.

Two earlier requests by Ford for a reduced sentence and/or relocation were denied by Wellford after prosecutors issued heated objections and complained they were not given copies of letters and messages urging leniency.

Clancy, the assistant U.S. attorney who handled the Ford case, called Wellford's meeting with Ford and Hooker "a very unusual, an extra-judicial sort of thing. We had already had a hearing—we had already heard both sides."

The prosecutor said the meeting appeared to fall outside the normal procedure of hearings on such issues. Despite his misgivings, he attended. "We were asked to send someone; we never were asked whether we agreed with it or not," he said.

He declined to discuss the content of the meeting.

Hooker, a millionaire businessman and former Democratic gubernatorial nominee, told the *Memphis Press-Scimitar* he attended purely as a friend of Emmitt Ford. "I really kind of invited myself to the hearing," Hooker said. Emmitt Ford had served as a Hooker campaign organizer.

He said Clancy "made a very strong statement not to let Emmitt out. I thought he was very unbending about that. I thought he could have been more charitable.

"I said Emmitt was a person who was a hero to many people; that he had obviously made a mistake; that he came from a fine family, and that he should be judged in light of his whole life, not just in the light of this one incident."

Hooker said Harold Ford described the trial and sentence as a "great embarrassment to the (Ford) family."

Wellford said his decision to cut the sentence was motivated more readily by the many "communications" he received from the public.

"That's the extent of it," he said. "There were never any informal discussions with anyone at any time."

[From the Memphis (Tenn.) Commercial Appeal, Aug. 4, 1982]

WELLFORD'S DECISION

Six years ago, in an effort to block U.S. District Judge Harry Wellford's nomination to the U.S. Circuit Court of Appeals, Rep. Harold Ford testified before the Senate Judiciary Committee that "serious questions" had been raised about Wellford's ability to conduct judicial proceedings "in a fair and impartial manner."

Among other things, Ford based his opposition on Wellford's rulings in civil rights cases and on his membership in the all-white Memphis Country Club.

Despite the enthusiastic backing of Sens. Howard Baker and Bill Brock, the Wellford nomination was killed after the committee, influenced by the testimony of Ford and a number of civil rights activists, refused to bring the nomination to a vote.

Last week, under Baker's sponsorship, Wellford's name again was placed in nomination to fill a vacancy on the Court of Appeals. The hearing on Wellford's nomination will begin today at 2 p.m.

That hearing probably would have attracted little attention had it not been for two recent news items.

Within days after President Reagan officially presented the nomination to the Senate, Wellford reduced the 20-month prison sentence of Harold Ford's brother—former state Rep. Emmitt Ford—to eight months, citing strains put on Emmitt Ford's family as a result of his imprisonment and numerous letters received on his behalf. That meant that Ford, who was sent to prison four months ago after being convicted of insurance fraud, could become eligible for release almost immediately as a result of legal technicalities and "good time" served.

Then shortly after making the Ford announcement, it was learned that Wellford had resigned from the Memphis Country Club.

Were Ford's sentence reduction, the country club resignation and Wellford's nomination to the Court of Appeals related? There is no proof they were.

Though Rep. Harold Ford probably did no more than any brother would have done in following standard procedures for obtaining an early release for his brother—the same appeal process is available to any citizen—questions have arisen.

What did Baker know about the Ford matter, and when did he know it?

The first Baker knew about the reduced sentence, says spokesman Tom Griscom, was when Griscom showed a news story of the judge's decision to the senator. According to Griscom, Baker had no advance knowledge of the decision, nor did he at any point discuss it with Wellford. But since Baker would "never try to second guess a judge," says Griscom, the senator does not intend to pull back from his sponsorship of Wellford.

Pulling back from his opposition to Wellford's appointment, however, is Rep. Ford, who told The Commerical Appeal yesterday that he would not testify against Wellford. He cited the judge's resignation from the country club.

When Wellford reduced Ford's sentence, he did nothing that he—or any other judge—has not done hundreds of times before: He showed compassion to an inmate prison officials said had demonstrated good behavior in prison and he responded to the pleas of people in the community who knew the defendant. There was nothing illegal or unprecedented in Wellford's action. Nothing much can be made of his resignation from the country club. Surely, if one has the right to join an all-white organization, one also has the right to resign that membership. Surely.

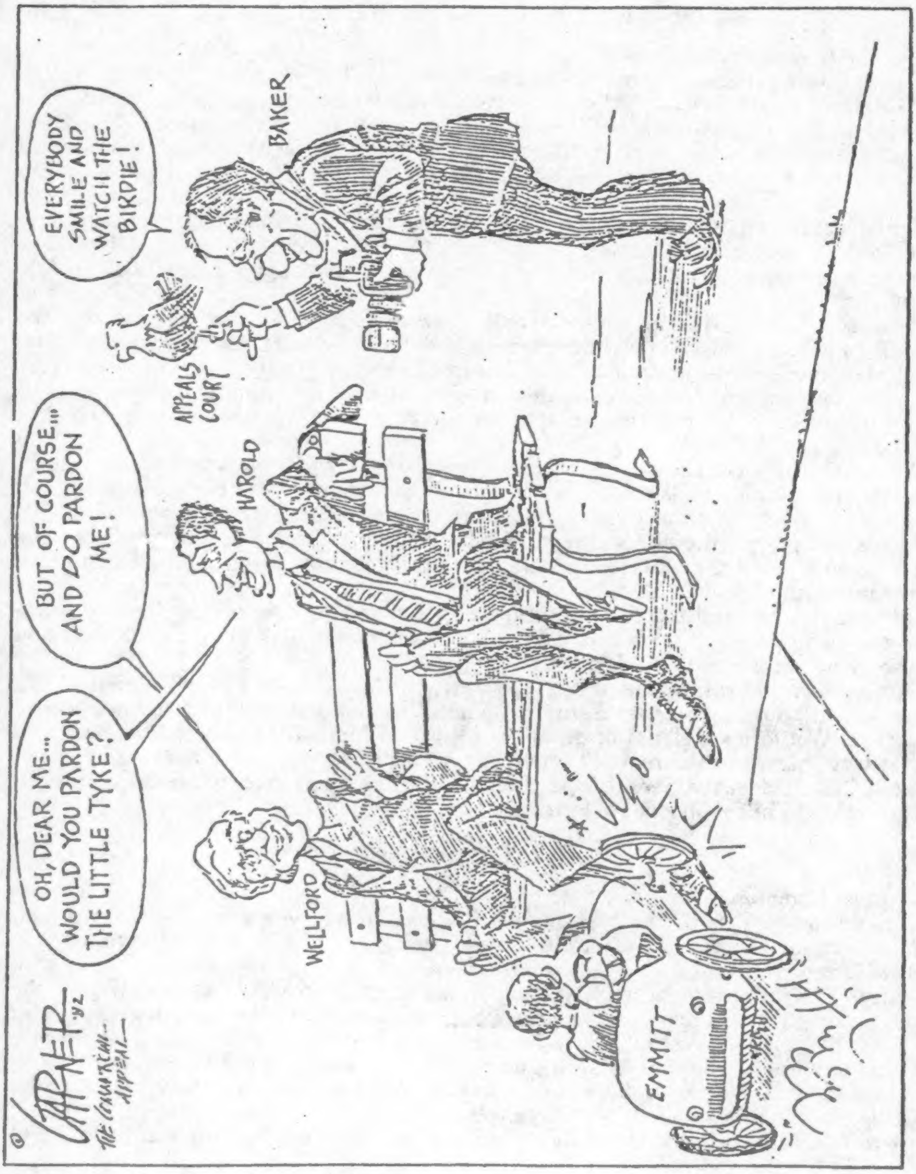
Still, Wellford, through the untimeliness of his actions, has fueled a public perception of political influence that could have been avoided had he but recused himself from the case. Federal rules of criminal procedures state that any federal judge can disqualify himself in any proceeding in which his partiality can be reasonably questioned. Indeed, the canons of judicial conduct require judges to avoid all appearances of impropriety.

Under the circumstances, Wellford could have avoided the controversy entirely by going to Chief Judge Robert M. McRae Jr. and asking to be removed from the case. It is standard procedure in federal district and appeals courts for judges to step aside when their presence offers even the appearance of a conflict of interest.

The situation in which Wellford now finds himself is a manifestation of the existing system as practiced by honorable men and women. What a tragedy it is that honorable public servants, when the judicial system is losing ground at an alarming rate in the public's estimation, place themselves in positions of doubt because they lack foresight and sensitivity.

Today, after being introduced by Baker, Judge Wellford will stand before the Senate Judiciary Committee and be questioned about his qualifications to serve on a higher court. A question that probably will not be asked of Wellford—but should be—is to what lengths a judge should go to dispel the widely-accepted public notion that it is not what you know but whom you know that makes the system work.

When all is said and done, that is the broader significance of the Ford case: That there is no fail-safe mechanism for the preservation of public confidence in the fairness of the courts.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THE COMMERCIAL APPEAL
OH, DEAR ME... WOULD YOU PARDON THE LITTLE TYKE?
WELLFORD
EMMITT
BUT OF COURSE... AND DO PARDON ME!
HAROLD
APPEALS COURT
EVERYBODY SMILE AND WATCH THE BIRDIE!
BAKER

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[From the Memphis (Tenn.) Commercial Appeal, Aug. 8, 1982]

WELLFORD INSULTED CITY IN FREEING FORD EARLY

To The Commercial Appeal:

The following has been sent to Sen. Howard Baker (R-Tenn.):

U.S. Dist. Judge Harry Wellford's recent decision to release Emmitt Ford after serving only four months is a disgrace and an insult to the community. The Commercial Appeal reported that Wellford declined to specify what changed his mind in overriding the vigorous objections of Asst. U.S. Atty. Dan Clancy. Is it possible that his resignation from a private Memphis club and the early release of Emmitt Ford might possible override the objections of Harold Ford and the black community to Wellford's appointment to a seat on the Sixth Circuit Court of Appeals? It should be remembered that Harold Ford led the fight to block this appointment in 1976. Add it up!

The Commercial Appeal quotes Wellford as saying. "The court appreciates the strain imposed upon the defendant's wife and family due to his incarceration; regrettably this occurs in almost every instance where a family man is incarcerated . . . He has not, from all indication, been given special attention or favorable treatment by reason of his prominence and having occupied an elective office at the time of the offense." Baloney!

To grant early release because the family business (that was started after Ford's conviction) is suffering is a slap in the face to this community. If this is the standard for early release from prison, we better be ready to open the gates to thousands of convicted felons whose families and businesses are suffering. Emmitt and Earlene Ford should have thought of that before they conspired to defraud 29 insurance companies out of $53,000.

My heart aches and bleeds for Emmitt and Earlene because of this terrible incarceration, and I rejoice with this community as a result of Wellford's humane and self-serving act. RICHARD M. BREESE.

EDITOR'S NOTE.—Since this letter was written, Rep. Harold Ford of Memphis has said he will not oppose the Wellford nomination. He said his decision was based solely on Wellford's resignation from the all-White Memphis Country Club, and was in no way related to the reduced sentence for this brother. After a hearing in Washington last Friday, the Senate, Judiciary Committee postponed a vote on Wellford's nomination to allow opponents to testify.

SO-CALLED JUSTICE

To The Commercial Appeal:

One of the reasons the average law-abiding citizen pays a higher insurance premium is because of unlawful acts, the likes of which Emmitt Ford was convicted. Yet Judge Harry Wellford feels he should be released.

Why? The judge says because of the public outcry for mercy. Baloney. Wasn't the man found guilty? It appears as another obvious case of criminal-coddling.

What feeling does Wellford have for the average citizen who is paying higher premiums because of criminal acts such as Emmit Ford was convicted of?

The taxpayer spends thousands and thousands of dollars apprehending and convicting the criminals and then a judge releases them.

It will be interesting to see if Rep. Harold Ford again opposes the confirmation of Judge Wellford.

This is my first and I hope last letter to the editor, but it sometimes burns me up to see how and why so-called justice is administrated. OLLIE SIMPSON.

(Exhibit 2)

SUMMARY OF PUBLISHED CIVIL RIGHTS DECISIONS OF U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT FROM JUDGE WELLFORD (536 F.2d through 660 F.2d)

1. *Stevens v. Hunt*, 646 F.2d 1168 (6th Cir. 1981); Five medical students expelled from University of Tennessee bring Section 1983 action alleging due process violation. Court of Appeals affirmed Judge Wellford's dismissal of the action.

2. *Gross v. University of Tennessee*, 620 F.2d 109 (6th Cir. 1980); Civil rights and antitrust action by discharged faculty members at University of Tennessee Medical School. Summary judgement granted to defendants holding that U.T. was not a "person" under Section 1983 and University had sovereign immunity under 11th Amendment. Affirmed on appeal because no violation of due process or equal protection. 1983 and immunity questions not reached.

3. *Kenner v. Morris*, 600 F.2d 22 (6th Cir. 1979); constitutional attack on Tennessee's alimony and child support statute because it does not make wives liable for such support. Three judge court convened and Judge Wellford, writing for he Court, dismissed the action because of (1) plaintiff (husband) had no standing and (2) abstention (divorce action was pending in state court). Appeals court expresses the view that the statute is unconstitutional in light of *Orr v. Orr*, 59 L.Ed. 2d 306 (1979) and that plaintiff had standing but affirms based on *Younger* abstention doctrine.

4. *Garner v. Memphis Police Department*, 600 F.2d 52 (6th Cir. 1979); 1983 action arriving out of death of juvenile, who was shot and killed by police officer while fleeing the scene of burglary of an unoccupied residence. Judge Wellford dismissed the action holding the city was not a "person" under 1983 and that shooting was result of good faith reliance on Tennessee law allowing shooting to kill a fleeing felon. Court of Appeals remanded in light of *Monell* and to determine, *inter alien*, questions of whether city has qualified immunity and whether deadly force policy was constitutional.

5. *Hodges v. Rose*, 570 F.2d 643 (6th Cir. 1978), *cert. denied*, 436 U.S. 909. Previous appeal, 423 U.S. 19 (1975). Second appeal by two prisoners from denial of petition for habeas corpus. Although Court rejects Judge Wellford's holding that one defendant's statement was admissible at trial, under *Bruton v. U. S.*, 391 U. S. 123 (1968) (admission of confession of a codefendant who did not take the stand violates defendant's right of confrontation, where confession implicates the defendant), Court of Appeals affirms denial of petiion for habeas corpus because one defendant's *Bruton* claim was meritless (because his codefendant took the stand), and the admission of other defendant's statement, even though improper, was harmless error.

6. *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977), *cert. denied*, 434U. S. 1062. Prisoner habeas corpus petition was denied by Judge Wellford. The Court of Appeals affirmed holding admission of evidence at trial of rape and robbery in addi tion to murder did not violate petitioner's due process rights even though the indictment only charged first-degee murder because the rape and robbery evidence was relevant to

prove premeditation. Two additional claims of petitioner were not discussed because the Court of Appeals believed they were without merit.

7. Seals v. Quarterly County Court of Madison County, 562 F.2d 390 (6th Cir. 1977). Third appeal in voting rights act case. (See Nos. 25 and 50 in Caldwell summary). Judge Wellford ruled for plaintiffs on pendent state law claim and denied attorney fees to plaintiffs, from which each side appealed. Sixth Circuit affirmed on merits, but reverses denial of attorney fees holding that legislative history of Civil Rights Attorney's Fees award Act of 1976 indicates that fees should be awarded where a non-constitutional claim is dispositive if the non-constitutional claim arises out of a common nucleus of operative fact and the constitutional claim is substantial.

8. Brown v. Ralston Purina Co., 557 F.2d 570 (6th Cir. 1977); Title VII action asserting discrimination based on race, color, and religion. A consent decree was entered on the class claims, but plaintiff's individual retliatory discharge claim was tried before Judge Wellford who ruled for the defendant. Plaintiff appealed; pro se, but Judge Wellford denied his motion for a transcript at government expense. On appeal, the Sixth Circuit ordered preparation of a transcript at government expense, but affirmed on the merits, holding no errors of law or clearly erroneous findings of fact.

9. Parham v. Hardaway, 555 F.2d 139 (6th Cir. 1977); Title VII and due process claim by discharged employee of Tennessee Department of Education. Judge Wellford ruled against the plaintiff on both claims and the Sixth Circuit, affirmed, holding that plaintiff was not entitled to either procedural or substantive due process because he did not have a "property interest" in his job under state law, and that, in any event, he had been accorded procedural due process and his discharge was not arbitrary and capricious.

10. McBride v. Delta Airlines, Inc., 551 F.2d 113 (6th Cir. 1977), cert denied 434 U.S. 927 (1977); vacated and remanded, 434 U.S. 916 (1977). Title VII and 1981 class action alleging race discrimination. Judge Wellford dismissed the claim holding that the named plaintiff's discharge was not discriminatory in purpose or effect. However, Judge Wellford implicitly found a persuasive pattern of discriminatory employment practices at Delta, but held that any injunctive or other relief would be "unwise". He also awarded plaintiff's counsel $500 in attorney's fees. The Court of Appeals affirmed the dismissal of the named plaintiff's claim but reversed the dismissal of the class claims and remanded for reformulation of the scope of the class, for findings and conclusions on the class discrimination claims, and for appropriate class remedies if a violation was found. The Supreme Court, without opinion, vacated and remanded in light of East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

11. Weaver v. Joseph Schlitz Brewing Co., 551 F.2d 122 (6th Cir. 1977); Title VII claim was dismissed by Judge Wellford because suit was not filed within 90 days of receipt of first letter of EEOC's two-letter notification process. EEOC issued first letter to plaintiffs informing them that they could request a "Notice of Right-to-Sue" letter. Each plaintiff promptly requested a right to sue letter and each filed suit within 90 days after issuance of the Right-to-Sue letter but more than 90 days after the first letter. Court of Appeals

reversed, holding that time for filing suit did not begin to run until the receipt of the second letter.

12. Wiley v. Memphis Police Department, 548 F.2d 1247 (1977), cert. denied, 434 U.S. 822. Action seeking damages and injunctive relief arising out of the death of a sixteen year old black youth, who was shot and killed by a Memphis police officer while fleeing the scene of a burglary of a sporting goods store. Judge Wellford dismissed the suit, after trial, holding that the police department's deadly force policy permitting the use of deadly force to apprehend fleeing felons was constitutional, and that the killing of the plaintiff's son was lawfully effected pursuant to that policy. The Court of Appeals affirmed upholding the constitutionality of the statute permitting use of deadly force against fleeing felons.

13. Equal Employment Opportunity Commission v. New York Times Broadcasting Service, 542 F.2d 356 (6th Cir. 1976); sex discrimination suit brought against a Memphis T.V. station arising out of the station's refusal to hire a female as an announcer or newswriter-reporter. The charging party was told in her interview that the station "already had a woman reporter and did not expect to hire another one." Judge Wellford dismissed the action. On appeal, the Sixth Circuit affirmed the dismissal of the individual claim because the charging part had suffered no loss of back pay and no longer sought employment with the defendant, but reversed Judge Wellford's holding that the defendant had not been discriminatory in its hiring practices.

SUMMARY OF PUBLISHED DECISIONS OF U. S. COURT
OF APPEALS FOR THE SIXTH CIRCUIT IN CASES
APPEALED FROM DISTRICT JUDGE HARRY W. WELLFORD
(433 F.2d THROUGH 535 F.2d)

1. Thornton v. East Texas Motor Freight, Inc., 454 F.2d 197 (6th Cir. 1972). Judge Wellford denied EEOC's motion for permissive intervention in Title VII case; Sixth Circuit affirmed per curiam.

2. West Tennessee ACLU v. City of Memphis, 454 F.2d 1162 (6th Cir. 1972), rev'g 323 F. Supp. 234 (W. D. Tenn. 1971). Action challenging on First and Fourteenth Amendment grounds a municipality's actions in allowing city hall office space to be used by one private organization, but refusing such use to another organization on the basis of its views and goals. Although none of the parties had raised any question as to the legality under state law of private use of public property, Judge Wellford sua sponte decided that such use was prohibited by state common law. The Sixth Circuit reversed per curiam, directing Judge Wellford to abstain and allow the parties to resort to state court. (The Supreme Court denied certiorari, 409 U.S. 879 (1972).)

3. Thomas v. Philip Carey Mfg. Co., 455 F.2d 911 (6th Cir. 1972). In a Title VII employment discrimination action Judge Wellford held that the plaintiff's prior acceptance of arbitration award under the collective bargaining agreement was binding and precluded the plaintiff's action. The Sixth Circuit affirmed per curiam.

4. Rogers v. Mascari, 455 F.2d 963 (6th Cir. 1972). Diversity action for injuries sustained in automobile accident; jury verdict for defendant. The Sixth Circuit affirmed in an opinion by Senior Circuit Judge McAllister, holding that Judge Wellford had not erred in refusing plaintiff's requests to re-open closing arguments and to give special instruction on matter contained in closing argument of defendant's counsel, and that the jury's verdict was supported by the evidence.

5. United States v. Plunk, 456 F.2d 1027 (6th Cir. 1972). Criminal conviction for possessing and operating a still. Judge Wellford held that a government search warrant was invalid because it contained a typographical error, but allowed the evidence obtained pursuant to the search to be admitted under the "plain view" theory. The Sixth Circuit, per curiam, expressed its view that the search warrant should not have been invalidated but, since it was, the application of the "plain view" theory was questionable on the facts; the conviction was affirmed, however, because the error was harmless.

6. United States v. Hite, 461 F.2d 646 (6th Cir. 1972). Bank robbery conviction. The Sixth Circuit held per curiam that Judge Wellford (1) did not abuse his discretion under the circumstances by refusing to allow defendant to call the court-appointed psychiartrist as the last, rather than an earlier, witness for the defense, and (2) did not err in refusing a requested instruction on temporary insanity. (A third issue related to a claim of inconsistency in the jury's verdicts on each count of the indictment.)

7. Davis v. United States, 464 F.2d 1009 (6th Cir. 1972). Postconviction proceeding under 28 U.S.C. § 2255. Judge Wellford rejected petitioner's request for resentencing and a fresh opportunity to appeal from a prior multi-count conviction relating to forged postal money orders on the ground that he had been denied the right to appeal and the assistance of counsel for the purpose of appeal. Judge Wellford found (1) that petitoner was represented by counsel during the notice-of-appeal period

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and (2) that petitioner knowingly waived his right to appeal. The Sixth Circuit reversed in an opinion by Judge Miller, because both of Judge Wellford's determinative findings were contrary to the evidence.

8. Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), cert. denied, 409 U.S. 1114 (1973). Civil rights damage action against police officers by plaintiff who was wounded attempting to escape from the scene of a burglary. Judge Wellford entered judgment for the defendants, holding that the use of deadly force under the circumstances was necessary to effect the arrest of plaintiff. The Sixth Circuit affirmed per curiam, holding that the judgment was justified by the evidence.

9. Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), cert. denied, 409 U.S. 1029 (1972). Civil rights damage action against state prosecutor and law enforcement agent for suppressing exculpatory evidence and presenting false and misleading testimony resulting in plaintiff's murder conviction in state court (following which plaintiff had ultimately won a retrial and an acquittal). Judge Wellford dismissed the action against the prosecutor, holding that he was immune from civil liability. On an interlocutory appeal, the Sixth Circuit reversed in an opinion by Chief Judge Phillips, holding that on the facts as alleged the prosecutor was acting outside his quasi-judicial capacity and beyond the scope of his prosecutorial duties and, therefore, was not immune from civil suit.

10. McDaniel v. Baptist Memorial Hosp., 469 F.2d 230 (6th Cir. 1972), aff'g 352 F.Supp. 690 (W.D. Tenn. 1971). Wrongful death action against hospital asserting strict liability in tort for the death of plaintiff's husband who died from serum hepatitis contracted from blood transfusions. Judge Wellford dismissed the complaint, holding (1) that there was not strict liability under state law because, by virtue of a state statute, a blood transfusion did not constitute a "sale," and (2) that the state statute was constitutional. The Sixth Circuit affirmed in an opinion by Senior Circuit Judge O'Sullivan.

11. Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), cert. denied, 411 U.S. 986. Habeas corpus petition claiming denial of constitutional rights to a fair and impartial jury trial due to state trial judge's version of "Allen" charge given to deadlocked jury. Judge Wellford denied the petition without an evidentiary hearing. The Sixth Circuit reversed per curiam, holding that the jury charge in question contravened four established governing principles.

12. Reeves v. Power Tools, Inc., 474 F.2d 375 (6th Cir. 1973). Diversity action against manufacturer and supplier of powder-activated fastening tool which exploded and injured plaintiff. Judge Wellford directed a verdict for the manufacturer at the close of plaintiff's case; after the jury was unable to reach a verdict as to the supplier, Judge Wellford denied plaintiff's request for a new trial and entered a judgment for the supplier not withstanding the verdict. The Sixth Circuit, in an opinion by Judge Lively, affirmed the judgment in favor of the manufacturer but reversed as to the supplier, holding that the evidence was in conflict and that a properly-instructed jury could find against the supplier.

13. Taylor v. City of Millington, 476 F.2d 599 (6th Cir. 1973). Civil rights class action challenging a municipalty's operation of racially segregated public housing projects. Judge Wellford found unlawful segregation and entered an injunction; he also found that there was no evidence of damage, but awarded two of the plaintiffs $50 each in damages. On plaintiffs' appeal contending that the injunctive relief was

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inadequate, the Sixth Circuit affirmed *per curiam*; but the court *sua sponte* vacated the damage award.

14. *United States* v. *Kilpatrick*, 477 F.2d 357 (6th Cir. 1973). Criminal conviction for unlawful possession of untaxed whiskey. The Sixth Circuit reversed the conviction in an opinion by Senior Circuit Judge O'Sullivan, holding that Judge Wellford did not err (1) in refusing to charge the jury on entrapment or (2) in allowing the government to call a witness who invoked the Fifth Amendment, but (3) that the defendant was denied a fair trial because of improper argument to the jury by the U. S. Attorney.

15. *Farmers-Peoples Bank* v. *United States*, 477 F.2d 752 (6th Cir. 1973). Action by bank against government for alleged wrongful levy on the assets of an employer indebted to the bank; government counterclaimed under a statute imposing personal tax liability against a lender who loans funds to an employer for payment of wages and who has actual notice or knowledge that the employer cannot or will not pay the federal taxes due to be withheld from such wages. Judge Wellford granted partial relief to each party, and also denied the bank's demand for jury trial on part of the government's counterclaim. The Sixth Circuit, in an opinion by Judge Miller, held (1) that it was error to deny the demand for jury trial, (2) that Judge Wellford should reconsider a common-law-lien issue, and (3) that Judge Wellford's disposition was correct in all other respects.

16. *United States* v. *Eddings*, 478 F.2d 67 (6th Cir. 1973). Criminal conviction for possession and transportation of non-tax-paid whiskey. Judge Wellford refused to require the government to disclose the name of its informer in connection with defendant's entrapment defense. The Sixth Circuit affirmed in an opinion by Judge McCree, holding: (1) that the informer's identity was relevant to the defense and ordinarily should have been compelled, but in view of the evidence revealing defendant's criminal predisposition the informer's testimony would not have helped establish the entrapment defense; and (2) that reversible error was not committed by Judge Wellford in his jury charge, although the charge was deficient in certain respects.

17. *Flanagan* v. *Rose*, 478 F.2d 222 (6th Cir. 1973). Habeas corpus petition challenging state criminal conviction on ground of illegal search warrants. Judge Wellford denied petition, holding that the evidence showed that the issuing magistrate had sufficient evidence to justify the warrants. The Sixth Circuit reversed *per curiam*, holding that the warrant affidavits were clearly inadequate and that there was no evidence sufficient to show that the issuing magistrate took any sworn testimony to supplement the affidavits.

18. *Kelly* v. *United States*, 487 F.2d 898 (6th Cir.), *rev'g* 355 F. Supp. 776 (W. D. Tenn. 1973). Motion pursuant to 28 U.S.C. § 2255 to vacate 1965 bank robbery sentence on ground that sentencing judge was influenced by prior criminal convictions of defendant secured in violation of his right to counsel. Before the U. S. Attorney had responded to the motion to vacate, Judge Wellford denied the motion on the grounds that the sentencing judge had not imposed the maximum sentence, the sentence was not excessive, and the prior convictions had not been conclusively determined to be invalid. The Sixth Circuit reversed *per curiam*, holding that it was improper to deny the motion before the U. S. Attorney had answered, because if the motion's allegations were true defendant was entitled to relief.

19. *Johnson* v. *Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), *aff'd*, 421 U.S. 454 (1975). Employment discrimination action against employer and unions. Judge

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Wellford dismissed the complaint on grounds of res judicata (because of a prior complaint by the same plaintiff), failure to exhaust administrative remedies, and untimliness. The Sixth Circuit, in an opinion by Judge Weick, affirmed on all grounds. (The Supreme Court affirmed the Sixth Circuit on an issue not decided by Judge Wellford.)

20. United States ex rel. TVA v. T. Industries, Inc., 489 F.2d 921 (6th Cir. 1974). Condemnation action by TVA against landowner for a permanent easement. Three Commissioners appointed by Judge Wellford awarded the landowner $20,000 for the value of the easement and $76,000 for damages to the residue. On de novo review, Judge Wellford reduced the award to $10,000 and $9,000, respectively, without stating how he arrived at the $9,000 figure. The Sixth Circuit, in an opinion by Judge Weick reviewing the record de novo, increased the award to $20,000 for the easement (same as awarded by the Commissioners) and $45,000 for damages to the residue.

21. United States v. Matlock, 491 F.2d 504 (6th Cir. 1974), cert. denied, 419 U.S. 864. Bank robbery conviction. After sentencing and while defendant was being held in a local jail, Judge Wellford amended the sentence by increasing it as to one count. The Sixth Circuit held per curiam that the amended sentence would be improper unless defendant was being held in local jail for reasons unrelated to the bank robbery conviction, and the case was remanded for an appropriate determination. The court also (1) disapproved the U. S. Marshal's actions in taking defendant to and from the courtroom during trial via a route where he could be seen handcuffed by government identification witnesses, but found no prejudice requiring reversal in this case, and (2) held that it was not improper for the U. S. Attorney to advise a government witness that he did not have to talk to defense counsel.

22. Schnadig Corp. v. Gaines Mfg. Co. Inc., 494 F.2d 383 (6th Cir. 1974). Patent infringement action. Judge Wellford held that patent was valid and had been infringed by defendant. The Sixth Circuit affirmed in all respects in an opinion by Chief Judge Phillips.

23. Brooks v. Southwestern Transportation Co., 494 F.2d 1271 (6th Cir. 1974). FELA action against trucking company and railroad for personal injuries and death, and for state workmen's compensation benefits. Judge Wellford dismissed the FELA action because decedent was not a railroad employee (even though trucking company was owned by railroad), but awarded workmen's compensation benefits against trucking company. The Sixth Circuit affirmed per curiam the holding that the FELA was inapplicable and that there was no basis for piercing the corporate shield between the trucking company and the railroad.

24. Deyerle v. Wright Mfg. Co., 496 F.2d 45 (6th Cir. 1974). Action by patent owner and licensee for patent infringement, common-law trademark infringement, violation of name-and-reputation rights, and unfair competition. Judge Wellford found that (1) the patent was valid, (2) it was willfully infringed in part, (3) it was infringed in other parts pursuant to the doctrine of equivalents, (4) there was common-law trademark infringement, (5) unfair competition, and (6) violation of name-and-reputation rights; treble damages and attroneys' fees were awarded. The Sixth Circuit, in an opinion by Chief Judge Phillips, (1) reversed the findings relating to direct infringement and the doctrine of equivalents as being clearly erroneous, (2) directed that the award of attorneys' fees be modified, and (3) affirmed in all other respects.

25. Seals v. Quarterly County Court of Madison County, 496 F.2d 76 (6th Cir. 1974). Action by black citizens challenging

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at-large election system on ground that it diluted black voting strength. Judge Wellford found no unconstitutional dilution. The Sixth Circuit, per Chief Judge Phillips, vacated and remanded for reconsideration in light of two Supreme Court decisions.

26. *United States* v. *Hearn*, 496 F.2d 236 (6th Cir. 1974), *cert. denied*, 419 U.S. 1048. Criminal convictions for conspiracy (two defendants) and receiving and concealing stolen property moving in interstate commerce (one defendant). Judge Wellford refused to suppress evidence on illegal-search grounds. The Sixth Circuit, in an opinion by Chief District Judge Wilson (E. D. Tenn., sitting by designation), reversed the substantive conviction because the warrant was invalid and the search not voluntarily consented to, but affirmed the conspiracy convictions because defendants lacked standing to question the search.

27. *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). Employment discrimination action against employer and union. Judge Wellford found unlawful discrimination and awarded limited backpay and seniority relief, as well as attorneys' fees. The Sixth Circuit, per Judge Weick, affirmed the limitations on relief, but reversed the findings against the union as being clearly erroneous.

28. *United States* v. *Masonry Contractors Assoc. of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974). Employment discrimination action brought by government against contractors and union. Judge Wellford found unlawful discrimination against black bricklayers and awarded backpay and quota relief. The Sixth Circuit, per Judge Weick, affirmed except as to five contractors who were ordered exempted from the 5%-quota provision.

29. *Brewer* v. *Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974). Price discrimination action. Judge Wellford remitted a jury verdict of $32,000 to $10,000. The Sixth Circuit reversed *per curiam*, holding that the jury's award was clearly within the reasonable range and the remittitur was an abuse of discretion.

30. *Vickers Motors, Inc.* v. *Wellford*, 502 F.2d 967 (6th Cir. 1974). Petition for mandamus or prohibition to prevent Judge Wellford from referring discovery motions to magistrate. The Sixth Circuit denied the petition, holding that there was no abuse of judicial power.

31. *Perry* v. *Gulf, Mobil & Ohio R. Co.*, 502 F.2d 1144 (6th Cir. 1974). Wrongful death action against railroad. Judge Wellford granted judgment n.o.v. for defendant, holding that decedent was contributorily negligent as a matter of state law. The Sixth Circuit affirmed *per curiam*.

32. *Turner* v. *Impala Motors*, 503 F.2d 607 (6th Cir. 1974). Civil rights action against car dealer who resorted to self-help repossession as permitted by contract and state statute. Judge Wellford dismissed action for failure to state a claim. The Sixth Circuit affirmed in an opinion by Judge Peck, holding that self-help did not constitute "state action" within the purview of the Fourteenth Amendment or action "under the color of state law" as required by 42 U.S.C. § 1983.

33. *Monroe* v. *Board of Comm'rs of Jackson*, 505 F.2d 105 (6th Cir. 1974). School desegregation case. Judge Wellford adopted a desegregation plan closing one black school and leaving another elementary school 98% black; he also awarded an attorney's fee of $1,500, without articulating the basis therefor and without permitting an evidentiary hearing. The Sixth Circuit, per Judge Peck, (1) affirmed the closing of the black school, (2) reversed the failure to desegregate the remaining black elementary school, and (3) vacated the attorney's fee award and remanded for an evidentiary hearing and findings of fact and conclusions of law on that issue.

34. *Monroe* v. *County Bd. of Educ. of Madison County*, 505 F.2d 109 (6th Cir. 1974). School desegregation case. In a system that buses nearly 90% of its students, Judge Wellford adopted a geographic-zone desegregation plan leaving three former all-black schools racially identifiable; he also, without a hearing, awarded plaintiffs $1,500 as an attorney's fee. The Sixth Circuit, per Judge Peck, (1) reversed the geographic-zone plan and directed consideration of all desegregation techniques, and (2) vacated and remanded the attorney's fee award as in the *Jackson* case, *supra*.

35. *Hyde Properties* v. *McCoy*, 507 F.2d 301 (6th Cir. 1974). Interpleader action by maker of promissory notes against government and tax-lien creditor (transferee). The government alleged that transfer of the notes to transferee was a fraudulent conveyance. The transferee demanded a jury trial. Judge Wellford denied the government's motion to strike the jury-trial demand; but after a jury verdict for transferee, he granted the government a judgment n.o.v. and held that there was no right to trial by jury. The Sixth Circuit affirmed in an opinion by Judge Miller, holding that there was no right to jury trial and that the jury's verdict was therefore an advisory one in effect.

36. *Trigg* v. *Tennessee*, 507 F.2d 949 (6th Cir. 1974), *cert. denied*, 420 U.S. 938 (1975). *Habeas corpus* petition asserting denial of the right to a speedy trial by state officials. Judge Wellford denied the petition. The Sixth Circuit, per Judge Miller, affirmed, holding that the right was not denied under the circumstances.

37. *O'Neill* v. *Kiledjian*, 511 F.2d 511 (6th Cir. 1975). Diversity action against physician for malpractice. The jury gave a verdict for plaintiffs for $125,000. Judge Wellford granted the defendant a judgment n.o.v. The Sixth Circuit, per Judge Miller, reversed and reinstated the jury verdict, holding that there was substantial evidence from which the jury could have found negligent diagnosis.

38. *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir.), *cert. denied*, ___ *U.S.* ___ (1975) (*rev'g* 380 F. Supp. 1106 (W. D. Tenn. 1974)). Title VII action by EEOC alleging employment discrimination on the basis of race and sex. Judge Wellford dismissed the action because (1) suit was not brought within 180 days after charges were filed with the EEOC, (2) one group of charges could not be the basis for the suit because conciliatio was not attempted, (3) another group of charges was not available because EEOC failed to give notice as required by its regulations, (4) *res judicata* barred the EEOC from relying on another group of charges, and (5) the EEOC was limited to seeking intervention in a previously-filed private case as to another group of charges. The Sixth Circuit reversed on all grounds in an opinion by Judge Celebrezze.

39. *Magruder* v. *Northwestern Mutual Life Ins. Co.*, 512 F.2d 507 (6th Cir. 1975). Diversity interpleader action to determine right to life insurance proceeds. Judge Wellford held that an alleged change in the designated beneficiary had not been effectuated. The Sixth Circuit, per Chief Judge Phillips, affirmed.

40. *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975). Criminal conviction for mailing threatening letters. Judge Wellford held that (1) defendant was competent to stand trial, (2) the evidence was sufficient to support the guilty verdicts, and (3) evidence of prior threats against someone else was admissible to show motive or intent. The Sixth Circuit reversed for a new trial in an opinion by Judge McCree, holding (1) that the evidence was sufficient to support the verdicts, but (2) the prior-threats evidence was inadmissible because it was

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not in issue; (3)the court did not decide the competency question.

41. Evans v. Tennessee Dept. of Corrections, 514 F.2d 283 (6th Cir. 1975). Plaintiff brought civil rights case and was allowed to proceed in forma pauperis; case was subsequently dismissed voluntarily and judgment entered for defendants. Although defendants had incurred no statutory costs and had filed no bill of costs, Judge Wellford entered an order directing plaintiff to pay a filing fee to the district court clerk and service fees to the U. S. Marshal. The Sixth Circuit summarily reversed, per curiam, holding that costs are taxable only in favor of parties, not court officials, and that there was no statutory or rule authority for Judge Wellford's order.

42. Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), cert. denied as to one defendant, __ U.S. __ (1976), vacated and remanded as to other defendant, __ U.S. __ (1976) (same case as number 9, supra). Civil rights damage action against state prosecutor and state law enforcement officer for withholding exculpatory evidence and giving false and misleading testimony at plaintiff's state criminal prosecution trial, which resulted in plaintiff being incarcerated for one year before she was ultimately acquitted. After a nonjury trial, Judge Wellford held (1) that the defendants acted improperly, but (2) did not deprive plaintiff of her constitutional rights and did not proximately cause her incarceration; yet (3) plaintiff was awarded nominal damages against each defendant, and (4) costs were assessed against the defendant prosecutor. On appeals by all parties, the Sixth Circuit reversed in plaintiff favor in an opinion by Chief Judge Phillips holding that plaintiff's rights were violated by defendants whose acts were the proximate cause of plaintiff's incarceration, and the plaintiff was entitled to compensatory damages.

43. Hall v. Kroger Baking Co., 520 F.2d 1204 (6th Cir. 1975). Title VII employment discrimination action. Judge Wellford dismissed without prejudice, and provided that the suit could be refiled within 30 days. The Sixth Circuit held per curiam that refiling was barred by Title VII's statute of limitations, which could not be extended by the district court; the case was remanded with instructions to dismiss the complaint.

44. United States v. Hairrell, 521 F.2d 1264 (6th Cir.), cert. denied, __ U.S. __ (1975). Criminal conviction for possessin and transferring counterfeit money. Judge Wellford rejected defenses of double jeopardy, multiplicity in the four-count indictment, and entrapment, and allowed the government to introduce evidence of a prior prosecution in which defendant was acquitted and to cross-examine defendant about his prior criminal record. The Sixth Circuit, per Judge Lively, held that the prior-criminal-record evidence was impermissible, requiring reversal of the conviction on the two "transferring" counts, but affirmed on all other grounds the two-count conviction for possession.

45. Robinson v. Dow, 522 F.2d 855 (6th Cir. 1975). Action requesting a three-judge court to declare unconstitutional an FAA statute authorizing revocation of pilot's license without a prior hearing. Judge Wellford refused to request convention of a three-judge court and dismissed the complaint. The Sixth Circuit affirmed in an opinion by District Judge Taylor (E. D. Tenn., sitting by designation) holding that plaintiff had failed to exhaust administrative remedies and that the Court of Appeals had exclusive jurisdiction to review the agency's action.

46. Sawyer v. Methodist Hospital, 522 F.2d 1102 (6th Cir. 1975), aff'g 383 F. Supp. 563 (W. D. Tenn. 1974). Diversity action against physician, pathology corporation,

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public hospital and private hospital by patient who contracted serum hepatitis. Judge Wellford dismissed action against public hospital on the basis of governmental immunity, dismissed the warranty and strict liability claims on the basis of a state statute, and at the close of plaintiff's case directed a verdict for remaining defendants on issue of negligence. The Sixth Circuit affirmed on all grounds in an opinion by Chief Judge Phillips.

47. *Long* v. *Richardson*, 525 F.2d 74 (6th Cir. 1975). Action under 42 U.S.C. §1983 by law students against state university officials for out-of-state tuition fees previously paid by the students. Judge Wellford held that the suit was barred by the Eleventh Amendment. The Sixth Circuit, per Judge Edwards, affirmed

48. *Guy* v. *Robbins & Meyers, Inc.*, 525 F.2d 124 (6th Cir. 1975), *cert. granted*, ___ U.S. ___ (1976). Title VII employment discrimination action. Judge Wellford dismissed the complaint because a charge had not been filed with the EEOC within the statutory time limits, holding that plaintiffs pursuit of the collective bargaining grievance machinery did not toll the running of the statute. The Sixth Circuit, per Judge Weick, affirmed.

49. *EEOC* v. *McLean Trucking Co.*, 525 F.2d 1007 (6th Cir. 1975), *rev'g* 64 F.R.D. 643 (W.D. Tenn. 1974). Employment discrimination action against employer brought by EEOC under Title VII. Judge Wellford dismissed the action, holding (1) that since chargin party in EEOC administrative complaint had accepted an arbitration award, EEOC could not sue on the basis of his charge, (2) EEOC had not met suit requisites with respect to any other charge, (3) the prior filing of a private lawsuit precluded the EEOC's suit, (4) jurisdictional prerequisites as to unions had not been met; (5) unions were indispensable parties who could not be joined. The Sixth Circuit, in an opinion by Judge Miller, reversed on all grounds.

50. *Seals* v. *Quarterly County Court of Madison County*, 526 F.2d 216 (6th Cir. 1975)(same as number 25, *supra*). On remand from a prior appeal directing reconsideration of constitutional challenge to at-large election system, Judge Wellford refused to allow amended complaint asserting pendent state law claim on the basis of the abstention doctrine and the terms of the prior remand. The Sixth Circuit, per Judge Edwards, reversed and remanded for determination of the pendent state law claim.

51. *United States* v. *Ellzey*, 527 F.2d 1306 (6th Cir. 1976). Criminal conviction of physician for conspiracy and illegal distribution of controlled substances. Judge Wellford held that the indictment was not defective, that prescriptions written by defendant were admissible into evidence, and that the evidence supported the verdict. The Sixth Circuit affirmed *per curiam*.

52. *Jetero Constr. Co., Inc.* v. *South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976). Diversity action for breach of implied warranties of merchantability and fitness. Judge Wellford entered judgment of $25,000 for plaintiff; upon plaintiff's motion to amend the judgment, Judge Wellford increased award to $29,000 despite noting factors adverse to plaintiff; thereafter, in response to a memorandum filed by plaintiff, Judge Wellford increased the award to $39,000 in an "Amended Final Judgment." On appeals by both parites, the Sixth Circuit, per Judge Celebrezz in an opinion critical of "the District Court's highly unusual post opinion procedure" (531 F.2d at 1351), held that Judge Wellford was without jurisdiction to enter the "Amended Final Judgment"; the court also vacated the initial damage award against defendant and remanded the case to Judge Wellford "for appropriate findings of fact and conclusions of law as to the proper measure of damages," because his "terse," confusing and inconsistent findings made appellate review impossible.

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53. *Craft* v. *Memphis Light, Gas & Water Division*, 534 F.2d 684 (6th Cir. 1976). Civil rights action alleging that public utility violated due process and equal protection principles in its practices relating to termination and refusal of service. Judge Wellford held that (1) the case was not a proper class action, (2) there was no civil-rights jurisdiction over the utilit itself, and (3) that the utility's termination practices were not unconstitutional. The Sixth Circuit, per Judge Peck, affirmed the denial of class action treatment, but reversed Judge Wellford's holding that the termination procedures were not unconstitutional.

54. *Qualls* v. *Parrish*, 534 F.2d 690 (6th Cir. 1976). Civil rights action against sheriff and two deputies for shooting plaintiff's decedent to death following high-speed automobile chase. Judge Wellford held for defendants, finding that the officers were justified in using deadly force after the suspects had committed a felony by assaulting the officers with an automobile. The Sixth Circuit, in an opinion by Judge McCree, affirmed the judgment.

55. *Memphis American Federation of Teachers* v. *Board of Educ. of Memphis City Schools*, 534 F.2d 699 (6th Cir. 1976). Constitutional challenge by rival labor union seeking equal privileges with Board-recognized union. Judge Wellford expressed doubt that the court had jurisdiction but, without resolving the jurisdictional issue, proceeded to decide the merits, holding (1) that no First Amendment rights were abridged by the Board's policy, but (2) that the policy created a classification violative of the Equal Protection Clause of the Fourteenth Amendment. On the Board's appeal, the Sixth Circuit, per Judge Weick, held that "[i]t was inappropriate for the District Court to assume the existence of jurisdiction and then proceed to decide the merits of this case," because "[w]ithout a finding that there is federal jurisdiction over a particular claim for relief the federal courts are without power to proceed." 434 F.2d at 701. The Court went on to find that the district court did have jurisdiction; on the merits, the Court affirmed Judge Wellford's holding that no First Amendment rights were abridged, but reversed his equal-protection holding because under the proper test ("[t]he District Judge did not make clear the nature of the test he applied," *id*. at 703) there was no impermissible classification.

56. *Greene* v. *City of Memphis*, 535 F.2d 976 (6th Cir. 1976). Civil rights action alleging that city closed a public street for racially discriminatory reasons and located community centers on racial bases. Judge Wellford dismissed the action for failure to state a claim upon which relief could be granted. The Sixth Circuit, per Judge Peck, reversed and remanded for a trial on the merits, holding that the plaintiffs had made out two distinct causes of action for racially discriminatory treatment.

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(Exhibit 3)

Nos. 80-1013, 80-1145

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,
v.
G. WEEKS SECURITIES, INC.; G. WEEKS CO., INC.; GERALD D. WEEKS; C. M. HODGE; JOHN KILPATRICK; PATRICK MICHAEL and RANDY VALLEN,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed May 19, 1982.

Before: MARTIN, Circuit Judge; WEICK, Senior Circuit Judge;* and COOK, District Judge.**

BOYCE F. MARTIN, JR., Circuit Judge. This consolidated appeal challenges two preliminary injunctions issued against appellant G. Weeks Securities, Inc. and others. On December 5, 1979, the District Court preliminarily enjoined appellants from further violating the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act

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* Circuit Judge Weick retired from active service under the provisions of 28 U.S.C. § 371(b) on December 31, 1981, and became a Senior Circuit Judge.

** Honorable Julian A. Cook, Jr., District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

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of 1934.[1] By separate order issued January 29, 1980, the court expanded the injunction to prohibit violations of the registration provisions of the 1933 Act.[2] This interlocutory appeal followed.

G. Weeks Securities, Inc. is a Delaware corporation registered with the state of Tennessee as a government securities dealer. G. Weeks Company is a municipal securities dealer registered with the Securities and Exchange Commission as a broker-dealer under Section 15(b) of the 1934 Act, 15 U.S.C. § 78o(b). The individual appellants are employees or former employees of these companies.

On October 26, 1979, the SEC brought civil enforcement proceedings against appellants, alleging that appellants were selling securities in violation of the anti-fraud and registration provisions of the securities laws. The substance of the SEC's charge is not at issue here and may be stated briefly. G. Weeks Securities and its agents were selling "standby with pair-off" contracts requiring the simultaneous purchase and sale for forward delivery of Government National Mortgage Association certificates. GNMAs are mortgage-backed certificates typically issued by mortgage bankers. The certificates are backed by the full faith and credit of the federal government and are specifically exempted from the registration provisions of the securities laws. 15 U.S.C. § 77c(a)(2). The SEC contended that G. Weeks Securities misrepresented to investors the nature of the standby transactions by telling them that: (1) the contracts involved purchases of GNMAs themselves; (2) the GNMAs would serve as collateral for all monies invested; (3) the full faith and credit of the U.S. Government guaranteed the investment; and (4) the GNMA certificates would be held in various banks. According to the SEC, the standbys were actually unsecured loans to G. Weeks Securities. The SEC also contended that the standby

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[1] 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b) and accompanying Rule 10(b)-5, 17 C.F.R. 240.10b-5.

[2] 15 U.S.C. § 77e(a); (c).

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contracts were securities which should have been registered. Finally, the SEC alleged that G. Weeks Securities sold these securities while insolvent, concealing its precarious financial condition from investors. The SEC requested the District Court to order an accounting and to appoint a receiver for G. Weeks Securities.

The parties have treated this appeal as if it were from a final judgment on the merits. Although the underlying issues in this case are comlex, the immediate problem is not. Our sole concern is whether the District Court abused its discretion in issuing the two preliminary injunctions. *SEC v. Senex Corp.*, 534 F.2d 1240 (6th Cir. 1976).

Appellants contend that the District Court abused its discretion by issuing the injunctions before allowing them to present "live" testimony. Specifically, appellants complain that they did not receive adequate notice and a fair hearing under Federal Rule of Civil Procedure 65 because their witnesses were not heard in rebuttal to the SEC's *prima facie* case. That case was established by the testimony of numerous SEC witnesses in the course of six hearings held prior to the issuance of the injunctions.

We agree in part with this argument. The anti-fraud injunction turned on disputed factual questions concerning whether appellants misrepresented the true nature of the standby with pair-off and whether G. Weeks Securities was insolvent at the time it sold these contracts. Rule 65 requires a hearing before a preliminary injunction may issue. A hearing implies the opportunity to be heard and to present evidence. *Detroit & Toledo Shore Line R. Co. v. Broth'd. of Local F. & E.*, 357 F.2d 152 (6th Cir. 1960). Observance of the Rule's hearing requirement is particularly important where the facts are disputed:

> "But if the allegations of a complaint are denied by a defendant, [as was true in this case] he is entitled to a hearing, which includes the right to offer evidence in support of his factual claims * * * A hearing embodies

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> the right to be heard on the controverted facts, as well as upon the law." (citations omitted).

Id. at 153-154, *quoting Carpenter's Dist. Council* v. *Cicci*, 261 F.2d 5, 8 (6th Cir. 1958).

We hold that the District Court abused its discretion by resolving disputed factual questions in favor of the SEC without first hearing the appellants' live testimony. Accordingly, that injunction is reversed and remanded so that the District Court can hold a hearing at which appellants may offer their version of the disputed facts.

We turn now to the registration injunction. We believe that order properly issued because the District Court had before it adequate documentary evidence upon which to base an informed, albeit *preliminary* conclusion that the standby with pair-off contracts were securities subject to registration. Where the resolution of the questions to be considered in issuing a preliminary injunction turns on legal rather than factual conclusions, the taking of oral testimony by both sides is not a prerequisite to a fair hearing. *SEC* v. *Frank*, 388 F.2d 486 (2d Cir. 1968).

Appellants, in the documentary evidence and briefs they submitted both to the District Court and this court, vigorously deny representing to the investing public that the standby with pair-off involved the actual purchase of GNMAs or that the transaction was somehow backed or collateralized by government securities. Instead, they maintain that the transaction involved only forward contracts for the future purchase and sale of GNMAs. At least one court has held that such contracts enjoy the same exemptions as GNMAs purchased on the cash market. *See Bache Halsey Stuart, Inc.* v. *Affiliated Mortgage Investments*, 445 F.Supp. 644 (N.D.Ga. 1977). On the basis of this authority, appellants argue that the standby with pair-off, like other forward GNMA contracts, need not be registered. However, an analysis of the documentary evi-

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dence submitted to the District Court does not, as a matter of law, permit such a conclusion.

The following example, provided by appellants themselves, illustrates how the standby with pair-off operated:

(a) GWS agrees to sell a GNMA bond to customer A for settlement in 120 days at a price of $95. The current market price is $95.

(b) Simultaneously, customer A agrees to sell to GWS a GNMA bond on a standby basis for settlement in 120 days at a price of $101. "Standby basis" means that the customer need not sell to defendant, but may sell to outside investors if the price of the bond rises above $101.

(c) Customer A pays a commitment fee of $5.15 to GWS.

(d) If, in 120 days, the price of the bond is below $101, customer A will elect to deliver the bond to GWS. Because both parties have simultaneous obligations to buy and sell, no actual exchange takes place. GWS makes a $6 payment to customer A, which represents a return of the commitment fee, plus stated interest.

(e) If the market price in 120 days is higher than $101, customer A may purchase the bond from defendant and sell it on the open market.

This scheme guaranteed the investor a positive return on his money. If the market fell, G. Weeks Securities would nevertheless return the standby commitment fee plus a stated amount of interest. Conversely, if it rose, at least the same amount would be returned and if the increase in price was large enough, above 101 in the example, the investor would reap an additional return in the form of profits taken on the cash market from the sale of the GNMA on which he accepted delivery. This aspect of the standby with pair-off,

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the guaranteed return, distinguishes this transaction from more conventional forward contracts and places the scheme within the realm of investment contracts subject to registration.

Forward contracts are agreements to sell a commodity, here GNMAs, at a fixed date in the future for a price determined at the time the contract is written. The securities are not paid for until the future settlement date. These contracts are generally available in one of two forms: (a) firm commitment or (b) standby. A firm commitment contract offers the buyer the opportunity to purchase a commodity at some point in the future at or near current prices. Buyer and seller reverse the risks of price fluctuations that they would normally carry. That is, if the price should rise between the execution and settlment dates, the return flows not to the seller but to the buyer because he has locked himself into a lower purchase price. A decline in prices produces the opposite result. In either event, the sale will be transacted on the settlement date and both parties will then realize their respective gains or losses.

A standby contract, on the other hand, allows the holder of a commodity to contract away the risk that prices will fall. For a nonrefundable fee, the seller of the standby will agree to purchase the commodity at some point in the future for a set price. If on the settlement date, the market price is below the established "strike" price, the purchaser of the standby will sell the commodity to the standby seller for the strike price. However, if market prices at that time range above the strike price, the buyer will not exercise the standby but will sell his commodity on the open cash market.

From a securities law standpoint, the key element in both instances is that the only additional risks presented by a forward, as opposed to a cash, contract are those of price movements during the executory period. Because prices are determined by competitive market forces, registration of forward contracts could provide no data about the seller which

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would be relevant to those market risks. The gain or loss stems from the impersonal marketplace alone. It is not the product of a commercial endeavor. Hence, under these circumstances, a forward contract does not meet the law's test of a security subject to registration as "an investment of money in a common enterprise with profits to come solely from the efforts of others." *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 301 (1945).

Appellants' scheme, the standby with pair-off, offered an inducement available under neither form of the traditional forward contract, a guaranteed return. Unlike firm commitment or standby forward contracts, the contract sold by G. Weeks Securities was to be a "no lose" proposition for the investor. Upon entering a standby with pair-off, the investor would receive the following document from G. Weeks Securities:

> "This document will serve as your written guarantee from G. Weeks Securities, Inc. that your investment of $________ for ____ months will accrue interest during the ____ month period in the amount of $________.
>
> "The annual rate of return on your investment will be ____%. This means that in __________ of '79, you shall receive from G. Weeks Securities, Inc., a check in the amount of $__________."

The payment of this "interest", unrelated as it was to the risks of the marketplace, was entirely dependent upon the investment skills of G. Weeks Securities. That conclusion is inescapable in light of the structure of the standby with pair-off as appellants themselves explained it. G. Weeks Securities could accept the risk of adverse price fluctuations and guarantee a positive return only if they successfully invested the commitment fees deposited by investors. Thus, the standby with pair-off would appear to fit precisely the Supreme Court's definition of a security as an investment contract. *See W. J. Howey Co., supra.* In the alternative, the District Court might have concluded that appellants' standby

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contract, together with the guarantee letter reprinted above, constituted an "evidence of indebtedness" and so met the test of a security under Section 2(a) of the Securities Act, 15 U.S.C. § 77b(1).

In any event, the proper label need not be permanently affixed here; that function may be undertaken at the trial of this case on the merits. In the context of a preliminary injunction, the court's discretion should be guided by asking whether the party seeking the injunction has shown a substantial likelihood of success on the merits. *Mason County Medical Assn.* v. *Knebel,* 563 F.2d 256, 261 (6th Cir. 1977). The documentary evidence before the District Court easily allowed the SEC to meet that standard on the registration issue. We affirm the District Court's order enjoining appellants from further violating the registration provisions of the Securities Act, 15 U.S.C. § 77e(a); 77e(c).

In conclusion, we note that our decision today in no way applies to conventional forward contracts. The securities law question decided here turned on the particular facts of this case alone. We have found only that on the basis of the undisputed facts before the District Court, that court could, as a matter of law, preliminarily determine that the contract sold by appellants was a security subject to registration. Furthermore, because that conclusion turned on disputed legal questions alone, that particular injunction could and properly did issue before appellants' witnesses were heard by the District Court. *SEC* v. *Frank, supra.*

Reversed in part and affirmed in part. Remanded for proceedings consistent with this opinion.

BEST COPY AVAILABLE

Mr. SHORT. We now stand in recess.

[Whereupon, at 4:45 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

WILLIAN M. ACKER, JR.

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ALABAMA

Birth: October 25, 1927, Birmingham, Ala.

Legal residence: Alabama.

Marital status: Married to Martha Walters Acker, 2 children.

Education: 1945-46, 1947-49—Birmingham-Southern College, B.A. degree; 1949-52—Yale Law School, LL.B. degree.

Bar: 1952—Alabama.

Military service: 1946-47—U.S. Army.

Experience: 1952-57—Associate, Graham, Bibb, Wingo & Foster, Birmingham, Ala.; 1956-57—Recorders Court, Town of Irondale; 1957-72—Partner, Smyer, White, Reid & Acker, Birmingham; 1972 to present—Member, Dominick, Fletcher, Yeilding, Acker, Wood & Lloyd, P.A., Birmingham.

ROBERT A. DESTRO

NOMINEE, COMMISSION ON CIVIL RIGHTS

Birth: September 6, 1950, Akron, Ohio.

Legal residence: Wisconsin.

Marital status: Married to Brenda Cloonan Destro.

Education: 1968-72—Miami University, Oxford, Ohio, B.A. degree; 1972-73—University of Akron, Ohio, School of Law; 1973-75—University of California, Berkeley Boalt Hall School of Law, J.D.

Experience: Summers 1972-74—City of Akron, Department of Recreation and Parks; Summers 1972-74—Amer, Cunningham & Brennan, L.P.A., Akron; 1974-75—Boalt Hall School of Law Berkeley, Calif.; 1975-77—Squire, Sanders & Dempsey, Cleveland, Ohio; 1977-82—Catholic League for Religious and Civil Rights, Milwaukee, Wis.; 1978-82—Marquette University School of Law, Milwaukee; August, 1982—Catholic University of America School of Law, Washington, D.C.

CONSTANTINE NICHOLAS DOMBALIS

NOMINEE, COMMISSION ON CIVIL RIGHTS

Birth: July 29, 1925, Norfolk, Va.

Legal residence: Virginia.

Marital Status: Married to Mary Chris Fourgis Dombalis.

Education: 1943-49—Holy Cross Theological School (Hellenic College), Brookline, Mass. B.Th.; 1949-50—Episcopal Theological Seminary, Cambridge, Mass., and Harvard Divinity School, Cambridge, postgraduate studies; 1950-51—The Episcopal General Theological Seminary of New York City, B.D.; 1951-52—Columbia University, New York, N.Y., post graduate studies.

Experience: 1954 to present—Dean, Sts. Constantine and Helen Greek Orthodox Cathedral, Richmond, Va.; 1960—White House Conference for Children and Youth, Group Leader; 1963—Richmond Area Ministers Association, vice president; 1964—Richmond Area Ministers Association, president; 1960-72—Council of Greek Orthodox Churches in Virginia, president; 1966-68—Virginia Council of Churches, vice president; 1976-78—Virginia Council of Churches, president; and 1978-82—Hellenic College/Holy Cross Theological School Alumni Association, president.

MARIA GUADALUPE QUINTANILLA

NOMINEE, COMMISSION ON CIVIL RIGHTS

Birth: October 25, 1937, Ojinaga, Mexico.

Legal residence: Texas.

Marital status: Married to Cayetano C. Quintanilla.

Education: 1966–69—Texas Southmost College, Brownsville, Tex., AA degree; 1968–69—Pan American University, Edinburg, Tex., BS degree; 1969–71—University of Houston, MA degree; and 1972-76—University of Houston, ED.D.

Experience: 1970 to present—YWCA; 1972 to present—University of Houston; 1978 to present—Houston Police Depatrment.

CONFIRMATION HEARING ON:

ROSS T. ROBERTS, THOMAS F. HOGAN, AND ALEX KOZINSKI

WEDNESDAY, AUGUST 18, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:10 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Staff present: Duke Short, chief investigator; and Pamela Swanner, investigative clerk.

NOMINATION OF ROSS T. ROBERTS

The **CHAIRMAN**. The committee will come to order.

We meet today to hold a hearing on two U.S. district court judges and a judge for the U.S. Claims Court. We have two distinguished Senators here from Missouri who are interested in one of these judges, Mr. Ross T. Roberts of Missouri. These Senators are busy, so we will hear from them first and then we will proceed. We will be very pleased to hear from you, gentlemen. Whichever one of you wishes to go first.

STATEMENT OF HON. THOMAS F. EAGLETON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator **EAGLETON**. Mr. Chairman, I will be brief. I could talk at great length about Mr. Roberts to be a Federal district court judge in Missouri. He comes to his wisdom in the law not only through his own talents but his father was a member of the judiciary in the State of Missouri. Mr. Roberts is associated in the practice of law with a close personal friend of mine and has a preeminent reputation, both as an individual and as a fine citizen and is a superbly well qualified lawyer, and so I recommend him to you, Mr. Chairman, enthusiastically, wholeheartedly, and unqualifiedly.

Thank you very much.

The **CHAIRMAN**. Thank you very much, Senator. We are glad to have you with us and I am sure your fine endorsement of him will be of good advantage.

Senator Danforth, we are pleased to have you. I presume that you selected this gentleman and recommend him for nomination.

Senator **DANFORTH**. Thank you, Mr. Chairman.

STATEMENT OF HON. JOHN C. DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI.

Senator **Danforth**. Ross Roberts is 43 years old, unless he has had a birthday since last May. He is a native of Joplin, Miss., a graduate of De Paul University and the University of Missouri Law School. At the law school he graduated first in his class. He was editor-in-chief of the Law Review and his Law Review comment on applied warranties is still viewed as the standard publication in its field.

From 1964 to 1968 he served as legal officer in the Marine Corps, and after leaving the service he was associated with the Kansas City law firm of Shook, Hardy, Ottman, Mitchell & Bacon until 1970. In 1970 he returned to Joplin to join his father's firm, Roberts & Fleischaker, where he practices today. Ross Roberts has extensive trial experience in both Federal and State courts. He is viewed by the bar as a lawyers' lawyer.

Mr. Chairman, the process that I go through in recommending a judicial nominee to the President is a merit selection panel, and this panel interviewed a number of lawyers who were interested in this appointment. They made three suggestions to me and I in turn suggested Ross Roberts to the President, and, really, the basis of that suggestion was to talk to a lot of lawyers who know him, and one of them described Ross as a future superstar of the bench. I really believe he is. I believe that Ross Roberts will initially be an outstanding Federal judge and I also believe that he has great potential to serve on the Federal bench for years to come. He has been active in bar activities. He is a member of the board of governors of the Missouri bar. He has recently been elected a director of the American Bar Foundation. He is a member of the Missouri Supreme Court Rules Committee and the Federal Practice Committee of the Western District of Missouri.

I believe, Mr. Chairman, that one of the most exciting things a Senator can do is to recommend a nomination for the Federal bench, and it is with great enthusiasm that I present to you Ross Roberts.

The **Chairman**. Mr. Roberts, you are fortunate to have such an able Senator as Senator Danforth to select you for this position. I feel sure, knowing him as I do, he would not have selected you if you were not a man of strong integrity and unquestioned character and outstanding abilities, and from what he said about you, those are the qualities you seem to possess and you are young enough to be on the bench a long time.

Senator, do you want to stay along?

Senator **Danforth**. Yes, sir. I would like to.

The **Chairman**. Will you stand, please, and be sworn.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Roberts**. I do.

The **Chairman**. Without objection, we will place your biography into the record and that will save time.

TESTIMONY OF ROSS T. ROBERTS, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF MISSOURI

The CHAIRMAN. Would you like to introduce any members of your family who are here, Mr. Roberts?

Mr. ROBERTS. Yes. Thank you, Mr. Chairman. My wife, who is back here.

The CHAIRMAN. We are very pleased to have her here today. I notice you spent 4 years in the Marine Corps.

Mr. ROBERTS. Yes, sir.

The CHAIRMAN. I was down at Parris Island Saturday before last and witnessed a training down there of the marines at Parris Island. It is some of the toughest training I have ever seen. I was in World War II, and we trained for the landing on D-Day in France, but I have never seen any training that totaled what these marines are getting right now, so I am sure you served your country well there and I am always proud to greet a friend who served our country in uniform.

Now, I have a few questions here that I will propound to you.

Mr. Roberts, earlier this month the American Bar Association repealed its long-standing prohibition on the use of television, still cameras and tape recorders in courtrooms. In its place the association's house of delegates said that judges should be able to authorize "unobtrusive" use under carefully prescribed rules. Mr. Roberts, would you give me your opinion on the presence of television cameras in the courtroom?

Mr. ROBERTS. Mr. Chairman, personally my feelings about television in the courtroom at this point in time are essentially negative. There are a couple of difficult problems associated with it, I believe. In the first place, your courtroom has to, in some instances, be physically redone to accommodate the media in that way. I am concerned also with the fact that the various players in the courtroom, the judge, the jury and counsel may have a tendency to play to the camera rather than try a lawsuit. I will confess that I have never participated in a trial which was televised, and possibly with experience in that area my view might become more malleable. I would not find it difficult to experiment with it as a judge, but I would like to do it, I think, in delicate bites, perhaps.

The CHAIRMAN. I think you have pretty well expressed my views just the way you said it.

Mr. Roberts, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interest of his or her client?

Mr. ROBERTS. I think, Mr. Chairman, if that became apparent early on in the trial I might very well be inclined to call counsel back into chambers to make some rather strong suggestions to the effect that perhaps that unfortunate attorney might do well to have himself replaced in the case. I would, I think, be very, very concerned with leaving that person in the courtroom to try the case and myself trying to help him try the case. I think when that occurs, and I have seen it occur on occasion, it tends to subvert the whole process. Of course if you do not become conversant with his problems until later on in the trial, when it is extremely awkward to have him removed, I think you just have to hope. I do not think the judge ought to try and take his place.

The **CHAIRMAN**. Mr. Roberts, what kind of guidelines should a judge follow in determining propriety of Federal intervention into State affairs and are you concerned about strong advocates of public issues being appointed to the Federal bench?

Mr. **ROBERTS**. Mr. Chairman, if I can take those two questions in reverse order: I am concerned about strong advocates of public issues being appointed to the bench, simply because I think in some instances it is difficult for the leopard to change its spots, and I am not sure that the best judge is one who has the strongest view on the subject. It is not to say that because you have strong views on a subject you should be disqualified from sitting on an issue, but it runs somewhat counter to human nature, I think, to take someone who has violent views on to some issue and place him in a position of having to try that issue.

To go to your first question, the question of Federal intervention or Federal court intervention in State affairs presents a situation, I think, of great delicacy, and I think it ought to be approached in that way. I think the Federal courts' intrusion in State affairs ought to be as minimal as possible. Unfortunately sometimes that intrusion is going to occur, but I think it ought to be viewed as a delicate situation, and I think the existing Federal statute, the Federal Anti-Injunction Act, and the various abstention doctrines that have been developed by the Supreme Court and lower courts ought to be carefully followed and considered when one is presented with that kind of question.

The **CHAIRMAN**. In response to the committee questionnaire concerning criticisms of judicial activism, you stated: "In some instances, I believe, district courts have been unfairly subjected to such criticism when in fact their role was simply that of applying—as they must—constitutional or statutory interpretations imposed by the Supreme Court."

Now, Mr. Roberts, what do you feel is the proper application of stare decisis in constitutional law? Specifically what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. **ROBERTS**. Mr. Chairman, if I may answer that from the position of a Federal district court judge, I would say that when one takes the oath to uphold the Constitution he has, at the same time, and by doing so, agreed that he will apply the existing and controlling interpretations of the Constitution as made by the Supreme Court. It seems to me, therefore, that even if one's view of the particular constitutional issue differs from that of the Supreme Court precedent, if in fact that precedent is controlling, I think you are dutybound to follow it.

Now, if that question were to be addressed from the Supreme Court level I would suggest constitutional law has to have a certain capacity for flexibility and for change. If it did not we would be living even today with many Supreme Court decisions which I think would be unpalatable to our society today. I think even then one would have to approach the situation carefully and feel very certain of one's position.

The CHAIRMAN. Mr. Roberts, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. ROBERTS. Mr. Chairman, I think that one of the questions, one of the practical considerations that exist when a Federal court initially determines whether or not it can entertain an issue is whether or not the court by its orders can adequately deal with that issue. Accordingly, if I, for example, or any judge, has made the decision that I can adequately deal with that issue and by order can adequately control what happens, then at least that problem does not exist, and you simply then, I think, have to do the best you can to have your orders enforced, because if you do not your decision has been a nullity. But many times, I think addressing that initial question can tell you that perhaps you should not be entertaining jurisdiction in that case to begin with if you can avoid it, because you do not by your orders have the practical ability to enforce your judgment.

The CHAIRMAN. In times past some judges, especially some district judges, have taken over the running of school systems and operating of hospitals, in effect, giving orders, details. I have always felt that the State institutions should be run by the Governor and the laws of the State, not by the Federal courts, unless there is some constitutional question involved in which they feel they have to interject themselves. What is your feeling about that?

Mr. ROBERTS. I would agree completely, Mr. Chairman.

The CHAIRMAN. I think those are all the questions we have for you, Mr. Roberts. We wish you well on the bench and you are now excused.

Mr. ROBERTS. Thank you very much, Mr. Chairman. Thank you very much for your time. I would also express my thanks to Senator Eagleton for being here and to Senator Danforth and the President for making this opportunity possible.

The CHAIRMAN. Senator, I want to thank you for taking time out of your busy life and for remaining here during this hearing.

Senator DANFORTH. Thank you, Mr. Chairman.

NOMINATION OF THOMAS F. HOGAN

The CHAIRMAN. The next nomination is that of Mr. Thomas F. Hogan of Maryland, to be a U.S. District Judge for the District of Columbia.

Mr. Hogan, please remain standing to be sworn.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HOGAN. I do.

TESTIMONY OF THOMAS F. HOGAN, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF COLUMBIA

The CHAIRMAN. Do you have any of your family here? You might stand and introduce them, if you care to.

Mr. HOGAN. Thank you, Mr. Chairman. I have my wife with me, Martha, sitting here.

The CHAIRMAN. I understand she is a pediatrician.

Mr. HOGAN. Yes, she is, Mr. Chairman. She is taking care of a 2-year-old in my family right now.

The CHAIRMAN. The doctors generally require more training than lawyers, so she is probably better educated than you.

Mr. HOGAN. I know she is smarter than I am.

The CHAIRMAN. Are other members of the family here or friends you wish to introduce?

Mr. HOGAN. No. I have with me one of my partners, Mr. Devin Doolan, here today, and Mr. John S. Irving, who is in practice here.

The CHAIRMAN. We are pleased to have all of you here.

Without objection, your biography will be placed in the record.

The CHAIRMAN. What part of Maryland are you from, Mr. Hogan?

Mr. HOGAN. From Chevy Chase, Md. I was born in Washington, D.C., and moved around a little bit. My father was a military man in the Navy for 37 years as a military physician. We settled down here after he retired.

The CHAIRMAN. I just wonder if you are related to the candidate running for the U.S. Senate.

Mr. HOGAN. No, I am not, Mr. Chairman. I know Lawrence Hogan, but I am not related to him.

The CHAIRMAN. Mr. Hogan, you have engaged in extensive general litigation on both the State and Federal levels in the District of Columbia as well as the State of Maryland, I understand.

Mr. HOGAN. Yes, I have, Mr. Chairman.

The CHAIRMAN. Do you believe that litigants in State courts receive the same level of fairness, due process, and quality of justice as to litigants in Federal courts?

Mr. HOGAN. Mr. Chairman, I have rather strong views on that; I do. I have had rather extensive experience in our local courts in Maryland as well as in the Federal courts where I practice, and I can tell you that the judges, certainly in the Maryland courts, are as dedicated and hard working as any of the judges I know. I think they try to provide a high quality of service to the public and fairness and protection of the individual rights as they can. I recently spent a year as chairman of the Administration of the Justice Committee in Montgomery County for the circuit court wherein we moved into a new court facility, and, I believe, provided a fine facility for the citizens to redress their grievances with the most modern techniques that are available to manage the court system in a prompt and a fair way. I would hope that that will continue for the citizens certainly in Maryland as well as have the court continued to work for them and help them out, because I think there is unfair criticism leveled against the State courts that they are not trying very hard, and I know from experience that they try very hard to protect the citizen.

The CHAIRMAN. Mr. Hogan, you served as the statewide chairman of the American Bar Association's Maryland drug abuse education program. I am confident that as a result, you gained considerable insight into the drug problem facing our society. Mr. Hogan, would you give me your views on penalties for second- or third-time drug dealers?

Mr. **Hogan**. Mr. Chairman, I did have some exposure in that area because of my work with the drug abuse committee and became very concerned about the problem we have, particularly with our children today in facing a wide exposure and availability to drugs. My personal feelings are if someone has been given a chance and they fail that chance, and then they come back before a court, that that court may well impose rather stringent sentences upon those repeater individuals, particularly where they are purveyors or pushers of drugs. I feel that is something that has to be controlled in our society and the courts have a role in controlling that problem.

The **Chairman**. Mr. Hogan, do you feel it would be helpful to you to have a sentencing commission to establish uniformity in sentencing?

Mr. **Hogan**. That is an area that has given me some thought. It would be helpful to me, particularly as a new judge, to have some guidelines proposed that we could follow and review. I believe that citizens feel sometimes that great disparity in sentences are greatly unfair, and the way to have that controlled is to have some guidelines. I would be hesitant to say that I would want to have strict controls so there is no leeway, but guidelines would be very appropriate and something necessary to have.

The **Chairman**. Mr. Hogan, would you please describe for the committee the arrangements you have made to dissolve the financial interests in your law firm?

Mr. **Hogan**. Yes, Mr. Chairman. Pursuant to the rule I have agreed with my partners, and we have filed the statement with the committee that I will receive my partnership share of the net accounts receivable and work in progress, including all work on pending litigation over a 3-year period and there will be no money paid beyond that and we will sever all financial ties.

The **Chairman**. Mr. Hogan, in response to a portion of the committee's questionnaire relative to judicial activism, you stated: "I believe that when considering the factual and legal issues of a case the judiciary must remain aware of our system of separation of powers as provided by the Constitution. Simply stated, Congress makes the laws—the courts interpret them. I believe the judiciary should not intrude on the proper roles of the legislative or the executive branches of our Government."

Mr. Hogan, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking and what are the criteria that you would consider in resolving whether or not a decision was the type that ought to be made by a judge as opposed to an elected legislative body?

Mr. **Hogan**. Mr. Chairman, addressing the second part of that question first, it seems to me that any judge who is faced with a serious question like that has to first keep in mind, as I have indicated to the committee, that the separation of powers doctrine makes certain that we do not intrude into other branches of Government. Further, we should keep in mind that the doctrine of stare decisis, which was mentioned earlier today, that is the tradition of our common law. The courts are not to be lawmakers in robes and to reach out and attempt to create new laws, but we are here to interpret the law. I think we have to be concerned that we have the proper jurisdictional basis, that the case before the court is ripe for decision, that the parties have the appropriate standing and that we simply resolve the grievance before us without trying to step in and solve all the problems of society by one case. Those are some of the criteria, I believe, that certainly crossed my mind concerning that issue. Naturally, I would have to apply the law of the district in which I serve and would have to follow the Constitution of the United States, as I will, but I do have feelings that we should be ever mindful of our appropriate role under the traditional concepts of the common law, and that is really a judiciary's function, to resolve grievances, not to attempt to impose our views onto society. That is really the legislature's role, to pass laws concerning the operation of our society.

The CHAIRMAN. Mr. Hogan, I presume you were recommended by Senator Mathias for this.

Mr. HOGAN. I was, Your Honor. He called me earlier and said——

The CHAIRMAN. I understand he is tied up in another committee meeting. Otherwise, I am sure he would be here. He is a ranking member of this committee on our side and an able member, and if he wishes to place any statement in the record about you we will leave the record open for a couple of days.

Mr. HOGAN. I appreciate that very much, Mr. Chairman, if you will.

The CHAIRMAN. The other Senator has sent in his green slip not objecting to you.

Mr. HOGAN. Yes, I understood he has.

The CHAIRMAN. If he wishes to place any statement in the record we will give him the same opportunity. I think that covers everything. We hope you enjoy your service on the bench.

Mr. HOGAN. Thank you, Mr. Chairman. I want to thank you and the staff for the time and the opportunity to appear here. I want to thank the President for nominating me. Thank you all very much.

NOMINATION OF ALEX KOZINSKI

The CHAIRMAN. Our last nominee today is Mr. Alex Kozinski. Mr. Kozinski, would you come around and remain standing to be sworn.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KOZINSKI. I do.

The CHAIRMAN. Mr. Kozinski, would you like to introduce your family and any friends you have here?

Mr. KOZINSKI. Yes, Mr. Chairman. Thank you very much. In the audience is my wife, Marcy.

The CHAIRMAN. I might say she is an able antitrust lawyer on this committee, and if you do as good a job on the court as she does here you will be all right.

Do you have any other members of your family here or friends?

Mr. KOZINSKI. No, sir.

The CHAIRMAN. Without objection, we will place your biography in the record.

TESTIMONY OF ALEX KOZINSKI, NOMINEE, CHIEF JUDGE, U.S. CLAIMS COURT

The CHAIRMAN. Kozinski, you were recently appointed Commissioner of the current Court of Claims. Now you have been nominated to be chief judge of the U.S. Claims Court which comes into existence on October 1. Do you see any major problems in the transition of this court that were not contemplated in the legislation?

Mr. KOZINSKI. I am pleased to say, Mr. Chairman, that I have found no major problems. As always, when you have a significant piece of legislation and many details are involved, and there may be some clean up necessary in the future, but nothing that will affect the transition of the court between now and October 1. We are going full speed ahead with the transition process at this time.

The CHAIRMAN. Mr. Kozinski, the enabling legislation of the U.S. Claims Court deliberately placed your court under the "protective wing" of the Administrative Office of the U.S. Courts. Do you see this as an aid or a hindrance to the operation of the court?

Mr. KOZINSKI. Mr. Chairman, we are a court that is somewhat different from other courts that are under the administration of the AO in that we are a court of nationwide jurisdiction and, therefore, our problems will be somewhat different. I am hopeful that we will be able to work effectively with the Administrative Office and that our relationship will be productive. Certainly, for our part we will do our best to make the relationship productive and make it work well. If there are problems I hope we can work them out. One point that should be made, Mr. Chairman, is that although we come under the Administative Office we were not given a seat on the Judicial Conference which governs the Administrative Office. I would hope that if that proves to be a problem in the future the committee would consider the possibility of amending the legislation to give us a seat on the Judicial Conference.

The CHAIRMAN. Mr. Kozinski, the new court will have a set of injunctive powers in pre-award situations in Government contract disputes. Do you anticipate any problems in the exercise of this new jurisdiction and do you foresee any conflict with district court jurisdiction under the Scanwell doctrine?

Mr. KOZINSKI. Mr. Chairman, to answer your second question first, we do not anticipate any conflict with the district courts. There is a question in the legislation as to whether our jurisdiction is exclusive in the sense that it excludes the district courts or whether it does not. That question will be resolved not by us but by the district courts and the various circuits other than the Federal circuits. We are in the process of setting up procedures for the exercise of our new injunctive authority, and I anticipate no major problems. We expect to be able to handle the jurisdiction quite well.

The CHAIRMAN. Mr. Kozinski, do you anticipate any problems in the operation of the new court as a result of the June 28, 1982, Supreme Court decision in the *Northern Pipeline Construction Company* v. *Marathon Pipeline Co.* case?

Mr. KOZINSKI. Mr. Chairman, the question is one which is somewhat delicate because it may very well arise in a case which will come before the court, and which I may have to decide. The *North-*

ern Pipeline case did find that the Bankruptcy Court lacked certain authority because its judges did not have article III status. I would simply point out that there are differences between this court and the bankruptcy court, in that what we will consider will be claims against the Government and, therefore, in a sense, public rights, whereas at issue in the *Northern Pipeline* case were rights of private individuals. Whether that turns out to be a controlling difference I would hesitate to say at this time. I would reserve judgment on that issue until it is raised in a specific case. I do not anticipate that it will create any major problem in the transition process starting October 1.

The CHAIRMAN. Mr. Kozinski, I think that completes the questions we have. We wish you a pleasant tenure on the bench and I would like to ask you where will your headquarters be?

Mr. KOZINSKI. Mr. Chairman, our court is on Lafayette Square, at 717 Madison Place.

The CHAIRMAN. That is the same place as the Court of Claims?

Mr. KOZINSKI. Yes, Mr. Chairman, a very fine location. It is near the White House.

The CHAIRMAN. I think that completes this. We hope you enjoy your service on the bench.

Mr. KOZINSKI. Thank you very much, Mr. Chairman. I want to thank you and thank your staff for scheduling this hearing so expeditiously, and I want to thank the President for giving me this opportunity.

The CHAIRMAN. We will now stand adjourned.

[Whereupon, at 3 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

ROSS T. ROBERTS

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF MISSOURI

Birth: November 28, 1938, Joplin, Mo.

Legal residence: Missouri.

Marital status: Married to Jane Teel Roberts.

Education: 1956-60—De Pauw University B.A. degree; 1960-63—University of Missouri School of Law, J.D. degree.

Bar: 1963—Missouri.

Military service: 1964-68—U.S. Marine Corps.

Experience: 1963—Roberts & Fleischaker, Joplin, Mo.; 1968-70—Shook, Hardy, Ottman, Mitchell & Bacon, Kansas City, Mo.; 1970 to present—Roberts & Fleischaker, Joplin; 1971-77—Prosecuting attorney, Jasper County, Joplin, Mo.

THOMAS F. HOGAN

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF COLUMBIA

Birth: May 31, 1938, Washington, D.C.

Legal residence: Maryland.

Marital status: Married to Martha Wyrick Hogan, MD, 1 child.

Education: 1956-60—Georgetown University, A.B. degree; 1960-62—George Washington University Graduate School; 1962-66—Georgetown University, J.D. degree.

Bar: 1966—Maryland; 1967—District of Columbia.

Experience: 1966-67—Law Clerk to Hon. William B. Jones, U.S. District Court for District of Columbia; 1967-68—National Commission for the Reform of Federal Criminal Laws; 1968-75—Associate, McCarthy & Wharton, Rockville Md.; 1975-81—

Partner, Kenary, Tietz & Hogan, Rockville, Md.; and 1981 to present—Partner, Furey, Doolan, Abell & Hogan, Chevy Chase, Md.

ALEX KOZINSKI

NOMINEE, CHIEF JUDGE, U.S. CLAIMS COURT

Birth: July 23, 1950, Bucharest, Rumania, naturalized.

Legal residence: District of Columbia.

Marital status: Married to Mary Jane Tiffany, 1 child.

Education: 1968-72—UCLA, A.B. degree; 1972-75—UCLA Law School, J.D. degree.

Bar: California, District of Columbia, and U.S. Supreme Court.

Experience: 1975-76—Law clerk to Anthony M. Kennedy, Ninth Circuit Court of Appeals; 1976-77—Law clerk to Hon. Warren E. Burger, Chief Justice of the U.S. Supreme Court; 1977-79—Associate, Forry, Golbert, Singer & Gelles, Los Angeles, Calif.; 1979-81—Associate, Covington & Burling, Washington, D.C.; 1980-81—Deputy Legal Counsel, Office of President-elect Reagan; January to June 1981—Assistant Counsel, Office of Counsel to the President, The White House; June 1981 to present—Special Counsel, Merit Systems Protection Board.

CONFIRMATION HEARING ON:

EDWARD RAFEEDIE AND DAVID D. DOWD, JR.

WEDNESDAY, SEPTEMBER 15, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, in room 2228, Dirksen Senate Office Building, at 2:10 p.m., Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Metzenbaum.

Staff present: Duke Short, chief investigator; Bill Christensen and Allan Spence, investigators; and Pamela Swanner, investigative clerk.

NOMINATION OF EDWARD RAFEEDIE AND DAVID B. DOWD, JR.

The **CHAIRMAN**. The committee will come to order.

We are met today to consider the nominations of two judges, Judge Edward Rafeedie, of California, to be U.S. district judge for the Central District of California, and Judge David D. Dowd, Jr., of Ohio, to be U.S. district judge for the Northern District of Ohio.

First on the agenda here is Judge Rafeedie, and I see the distinguished Senator from California is with him.

The distinguished Senator from Ohio has a very urgent meeting. I just wondered, would you mind giving him 2 or 3 minutes, Senator. Would you have that time to spare?

Senator **HAYAKAWA**. It would be a pleasure to yield to the distinguished gentleman from Ohio.

The **CHAIRMAN**. We will be pleased now to hear from a distinguished member of this committee, Senator Metzenbaum.

STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **METZENBAUM**. Thank you, Mr. Chairman. I thank my colleague from California.

I am here to introduce David Dowd of Massillon, Ohio. David Dowd has a very distinguished record, going back to when he practiced privately when he came out of the University of Michigan Law School. He was in the Army, Judge Advocate General Corps. In 1961, he became assistant prosecuting attorney for Stark County, and 6 years later became prosecuting attorney for that county.

He held that job until 1975, and during that time he served on the Ohio Organized Crime Prevention Council, and was named as one of the seven appointed members on the Review of National Policy on Gambling.

In 1975, he began a 5-year stint as a judge in Ohio's Fifth District Court of Appeals, and from 1980 to 1981 he served as a Justice on the Ohio Supreme Court. Today, he is a member of the firm of Black, McCuskey, Souers & Arbaugh, in Canton, Ohio.

Frankly, Mr. Chairman, I have spoken with many people in that area, and all who know Judge David Dowd speak extremely highly of him. I have done extensive research on his background, and the worst thing I can say about him is that he is a Republican, and that is not too bad.

The CHAIRMAN. I am glad to hear you say that.

Senator METZENBAUM. Thank you.

The CHAIRMAN. I might say to Mr. Dowd that you are fortunate to have a member of this committee who endorses you so strongly. Senator Metzenbaum is a prominent member of this committee, and his endorsement, of course, will be of great benefit to you.

Senator METZENBAUM. Thank you very much.

The CHAIRMAN. We will now hear from the distinguished Senator from California, Senator Hayakawa.

STATEMENT OF HON. S. I. (SAM) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Thank you, Mr. Chairman.

During the past years, it has been a genuine pleasure to me to introduce to this committee a number of highly qualified judicial nominees. Their nominations have been a credit to the 30 men and women who serve on my judicial selection committee, and they have added to the competence and quality of the Federal bench in California.

In introducing Judge Edward Refeedie to you today, I believe that we have maintained the same high standard that we have sought in all our appointments, and I would like to read to you an August 16, 1982, editorial from the Santa Monica Evening Outlook, a newspaper with which I frequently agree, and therefore it is obviously a great newspaper.

This is the quotation:

> President Reagan will undoubtedly appoint many qualified people to Federal judgeships before he leaves the White House, but he is going to have a hard time topping his appointment of Judge Edward Rafeedie to the Federal bench.
>
> In his 11 years on the Superior Court bench, Rafeedie, 53, has demonstrated full knowledge of the law and consistent impartiality and fairness—qualities one expects in a first-rate judge. But he has also shown himself to have another quality sometimes lacking in jurists: respect and consideration for all those who appear before him regardless of their station in life.
>
> A graduate of Venice High School and the University of Southern California Law School, Rafeedie was first appointed to the bench in 1969. and it was Reagan, then Governor of California, who appointed him. Twenty-two months later, Reagan phoned the judge to tell him of his appointment to the Superior Court bench.
>
> In an era when respect for the judiciary is at a low ebb, it's reassuring that a jurist of Rafeedie's caliber is moving on to the Federal bench. He'll serve well the interests of the American people and their judicial system.

Mr. Chairman, I heartily concur with the judgment of the Evening Outlook, with the judgment of the President, and my judicial selection committee in introducing to you Judge Edward Rafeedie.

In my conversation with Judge Rafeedie in my offices just before coming down to meet with you, Mr. Chairman, I learned more at a personal level about Judge Rafeedie. He, like myself, is a child of an immigrant family. Although born in the United States, he was taken as a baby to the homeland of his parents, to Lebanon, and he was 8 years old when he and his brother were brought back to the United States.

At that time, he was unable to speak English. Judge Rafeedie says he is personally, himself, a great argument against the whole concept of bilingual education. Finding himself not able to speak English, or speaking English rather peculiarly, he was laughed at by his classmates in the Los Angeles area, and so he and his brother worked terribly hard to learn English well, and he learned it well enough, rapidly, without a bilingual program in Lebanese, or any other language, in order not only to graduate from college with honors, but to go on for his law degree and to become a distinguished jurist.

I know from discussion with him that he regards the present events in Lebanon, the assassination of the President-elect there, the disturbances there in Lebanon, with great heartbreak and concern, as we all do, but it must hit him harder than it hits the rest of us.

But the concern he has for Lebanon is the kind of concern he has for all people. Being an immigrant himself, he understands problems of all of us of immigrant origin and who, as an American, is not, except perhaps the American Indian, and they, too, may have been immigrants, coming across the Bering Straits in prehistoric times.

So I concur, as I said, with the judgment of the Santa Monica Evening Outlook and with the judgment of President Reagan. I think he is a man of compassion and insight, as well as great judicial learning, and who will certainly be an addition and an ornament to the Federal judiciary in California.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge Rafeedie, you are fortunate to have such an able and outstanding Member of the Senate to come forward and give you such a laudatory introduction and recommend you so highly. It will, of course, carry great weight with this committee.

Now, Senator, we will be pleased to have you stay on. If you have other business, feel free to leave.

Without objection, I want to place the biography of Judge Rafeedie in the record. I might as well also place in the record the biography of Judge David D. Dowd, Jr.

Now, I understand that Congressman Regula is here to also introduce Judge Dowd. Do you want to come around, Mr. Congressman? Do you have a statement at this time?

STATEMENT OF HON. RALPH S. REGULA, A U.S. REPRESENTATIVE FROM THE STATE OF OHIO

Congressman **Regula**. Thank you, Mr. Chairman. I appreciate your courtesy, because we are just about to have a vote in the House and this will enable me to get back.

Senator Metzenbaum has very well stated the qualifications of Judge Dowd, and I am certainly pleased to be here not only on behalf of myself, but on behalf of the Ohio Republican delegation. Our delegation strongly endorsed Judge Dowd for this nomination, and we are very pleased that the President chose to put his name in nomination before your committee.

Judge David Dowd is uniquely endowed with the qualities that will make an outstanding Federal jurist. I might say at the outset that from my observation and that of many others, and from his record as a jurist in Ohio, he fully understands and adheres to the separation of powers doctrine. He recognizes the role of the judiciary as opposed to the executive and the legislative. He has an excellent record as a prosecutor in our county. One of his predecessors in that office was William McKinley.

He has an outstanding record as an appellate judge and as a judge of the Supreme Court of the State of Ohio.

He demonstrated over and over again in his career that he knew how to interpret the law, and that that was the role of the judiciary. He did it very well, and had great respect in his service on the bench in Ohio.

I know that I can say without question that his integrity is of the highest degree. He is highly regarded in our community as a jurist and as an author of several texts on legal matters. He has a history of dedicated public service, both professionally and as a community leader.

I live in a nearby community to Judge Dowd. His work in his church, his community, in school matters, and in many different areas that are important to making a better community, has been outstanding. He brings to this responsibility a well-rounded background in both the law and in the service to his fellow man. Mr. Chairman, Judge Dowd will be a great credit to the Federal bench. I certainly am pleased to endorse him today.

The **Chairman**. Well, thank you very much, Congressman Regula. I am sure that you and your whole delegation have endorsed Judge Dowd, and I know he is appreciative of that. It is an aid to this record, too, to have so many fine people like you endorse him.

We are glad to have you with us today. Stay as long as you wish, or leave when you wish.

Congressman **Regula**. Thank you, Mr. Chairman.

The **Chairman**. Now, we will take up the first nomination, and I think we might swear both of you at once. Hold up your right hand, both of you.

The testimony that you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God.

Judge **Rafeedie**. I do.

Judge **Dowd**. I do.

The CHAIRMAN. Have a seat. You are first, Judge Rafeedie. We will question you first.

TESTIMONY OF JUDGE EDWARD RAFEEDIE, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

The CHAIRMAN. Judge Rafeedie, if you have any members of your family here, you may wish to introduce here.

Judge RAFEEDIE. I will be very pleased, Mr. Chairman, and I thank you. My mother is here, She is 77 years old, and she came to be here at this event. I would like to introduce her.

The CHAIRMAN. I thought that was your sister.

Judge RAFEEDIE. You know, that mistake has been made before. This is my mother, Nabeeha Rafeedie.

The CHAIRMAN. We are glad to have you here.

Are there any other members?

Judge RAFEEDIE. A cousin who lives here in Washington, Mr. Khalil Haddad.

The CHAIRMAN. We are glad to have you.

Mr. HADDAD. Thank you, Mr. Chairman.

The CHAIRMAN. Judge Rafeedie, I believe you sat on the Superior Court of California for the County of Los Angeles for approximately 11 years. Is that correct?

Judge RAFEEDIE. That is correct, sir.

The CHAIRMAN. Is that superior court, or is that municipal court?

Judge RAFEEDIE. It was the superior court.

The CHAIRMAN. That is the highest trial court in the State?

Judge RAFEEDIE. Yes.

The CHAIRMAN. Were you appointed by the Governor of the State?

Judge RAFEEDIE. Governor Reagan, in 1971.

The CHAIRMAN. Are you still on that court?

Judge RAFEEDIE. I am.

The CHAIRMAN. You are still a member of that court?

Judge RAFEEDIE. Yes, sir.

The CHAIRMAN. I believe this is a trial court, as you stated, with general jurisdiction over all matters?

Judge RAFEEDIE. That is true.

The CHAIRMAN. During this period, you have presided over thousands of cases, I suppose and I am confident you are very knowledgeable of the State laws of California.

Judge RAFEEDIE. Yes.

The CHAIRMAN. And do you foresee any difficulty in the transition from being a judge in the State court to being a judge in the Federal district court?

Judge RAFEEDIE. I really do not see any difficulty in making that transition. For one thing, about half of the judges now sitting in the Central District in California came from the superior court, and traditionally over the years many of the superior court judges have moved into the Federal court without any great difficulty.

I would say this to you, also, Mr. Chairman. I have had the opportunity in recent weeks to review a good deal of material concerning the work of Federal judges, and I find, actually, more similarity than dissimilarity in the handling of both criminal and civil cases. You are basically dealing with law problems, and a judge, when he sits on a case, whether it be Federal or State, is dealing with a determination of the facts and the application of the relevant law to the facts.

Whether that law be Federal law or State law, we very often on the State court will meet a case which requires the judge to reeducate himself for a particular case which may be new subject matter of which he may not have heard for a long time.

The CHAIRMAN. Now, judge, I understand that you are also in your fourth year as supervising judge in the West District Superior Court of Los Angeles County.

Judge RAFEEDIE. Yes, sir.

The CHAIRMAN. In that capacity, you were honored by unanimous resolution of the Los Angeles County Board of Supervisors for your part in reducing the court's civil case backlog by approximately 3,000 cases in a 1 year period. Is that correct?

Judge RAFEEDIE. That is true.

The CHAIRMAN. That is a record which I am sure you are very proud of, and do you have any recommendations or suggestions that would aid in reducing the case backlog that presently exists in the Federal district courts?

Judge RAFEEDIE. Well, sir, I could tell you what we did in the west district of Los Angeles County. We basically took a position that when a lawsuit was filed, it belonged to the court and did not belong to the attorneys. That is, from the standpoint of managing the case flow.

We determined when the pretrial conferences would be held, and there was no deviation unless it was absolutely necessary. We determined when the trial would proceed, and we did not grant frivolous or promiscuous continuances, so that the lawyers had a right to expect that a trial date was a reasonably certain date, and I also in that district inaugurated an arbitration procedure using the services of recently retired superior court judges and appellate court judges under a statutory plan which allows for the diversion of small cases to arbitration, and we pursued a very aggressive settlement policy, and I think that this is basically the way to reduce backlog, is to control and manage the case flow, and it must be the responsibility of the court.

The CHAIRMAN. Judge Rafeedie, in other words, your feeling, as I understand it, is that if a judge has a will to clear up these dockets, he can do it.

Judge RAFEEDIE. I didn't understand the question, sir.

The CHAIRMAN. I say it is your feeling that if a judge, a Federal judge, has the will to clear up these dockets, he can really do it?

Judge RAFEEDIE. Well, I think the Federal judge is the person who must be responsible for the backlog. Now, there are certain things that defy reform, Senator, in the judicial process. The human element is the one thing that cannot be controlled, and if you are dealing—there are certain judges that work at a slower pace, there are others that are more inept than others. There are judges who maybe take longer vacations than others, and that is a factor that you cannot control.

But to the extent that reform can be achieved in the reduction of backlog, I think that those elements that I have suggested are the way to do it.

The **Chairman**. It takes them longer to do the work, though, if they take longer vacations. Shouldn't they be willing to work longer and clear up the docket?

Judge **Rafeedie**. I certainly feel that way, yes, sir.

The **Chairman**. Judge Rafeedie, in response to a portion of the committee's questionnaire relative to judicial activism you stated:

> In my view, it is not the function of the Federal courts to administer the correctional systems of the states nor to exercise continuing oversight responsibilities over them. The courts were not intended to carry out those functions and lack the resources and expertise to do so.

Judge, are there ever any circumstances where your court might have a continuing administrative responsibility to oversee the implementation of one of its orders and, if so, what are the standards that you would use in reaching this decision?

Judge **Rafeedie**. Well, I probably should have qualified that response. I do think there is a situation where oversight responsibility might be required, if an issue is brought to the court within the framework of the issues framed by the litigation pending within the court.

For example, if a constitutional question is raised about whether or not the State officials are performing their functions or in failing to do so are depriving an individual of his constitutional rights, then I think it is the responsibility of the judge to act.

I think that the judge should do whatever is necessary, including, if necessary, to manage and control and exercise oversight over a State institution, but I do not think it should be done unless it is framed by the issues that it is an issue that has been litigated between the disputants that have come to the court.

A judge in my view should do this with reasonableness and restraint, and should not reach out to assume power that violates either the separation of powers or exceeds the scope of the issues framed by the litigation.

The **Chairman**. Judge, concerning judicial activism, you informed the committee, "My own State of California probably has the most activist supreme court in the country."

Could you give me some examples to support this statement and what recommendations do you have to correct this type of activity?

Judge **Rafeedie**. Well, one, the glaring case that comes to mind readily whenever anyone asks me this question is that our supreme court in California adopted the ALI Institute insanity test, replacing the McNaughton rule which had been the rule in California for over 100 years.

Not only was this done by the court, and I think it was just a majority of the court, maybe four or five, but it was done by the court after the legislature had expressly declined to do so, and this had happened a number of times. So we create the situation where four or five men or women sitting on the State supreme court are now changing the law of the State without the popularly elected officials having anything to say about it. I think this is evil, and the main evil that I think results from this is that it becomes known, when a court becomes activist, an activist court, it becomes known to those who have special interests and special issues, and they tend to set up cases to take to that court, because now they have found a vehicle for changing the law of the State without having to go through the tortuous process of the legislative process, of committee hearings, and the various other attributes associated with the legislative process. This was very bad and this, Mr. Chairman, crosses over liberal or conservative, because it can work either way, and I think it is bad for a handful of unelected officials, nonelected officials, to be making the law of the State. Another illustration in California and the havoc that has been wreaked which the State supreme court adopted for the State of California is comparative negligence, a very complex subject with many ramifications. It did not tell us how we were to handle indemnity, or cross claims, or other things that might have been worked out in a legislative process. We were left on a case-by-case basis to handle the various issues that came up from time to time. This is the type of thing that happens when the courts decide to become lawmakers, and I think that if judges want to make the law, then they ought to test themselves at the ballot box.

The CHAIRMAN. Well, your highest court in California is called the supreme court, is it not?

Judge RAFEEDIE. Yes, sir.

The CHAIRMAN. Is that the court that has the power to make these rules with the force and effect of law?

Judge RAFEEDIE. Well, that is the court that has issued these two rulings that I have just spoken about, which adopted a whole new law in the field of insanity.

The CHAIRMAN. From what you say, it sounds like to me they were making law instead of interpreting the law.

Judge RAFEEDIE. That is exactly what I feel they were doing, particularly in the case where the legislature had refused to act in adopting this insanity test.

The CHAIRMAN. Whether they refused or not, is that not a legislative function?

Judge RAFEEDIE. It is my view that it is a legislative function.

The CHAIRMAN. Now, who could overrule them? Was that appealed to the Supreme Court of the United States?

Judge RAFEEDIE. The Supreme Court of California has become a law unto itself, because they have insulated themselves from Federal review in many cases by making their decisions based upon independent State grounds, and that simply cuts off Federal review in many cases.

So, basically, that is a court of last resort, and when they, for example, enacted the ALI insanity test, that becomes the law of California, and there is no recourse.

The CHAIRMAN. Judge, I think those are all the questions I have for you. I hope you have a very successful and pleasant tenure on the Federal district court bench.

Judge RAFEEDIE. Mr. Chairman, I am very grateful for the opportunity to have appeared here, and I wish to express my thanks both to the President and to Senator Hayakawa and his committee for selecting me, and to you, sir, and your staff, for your courtesy.

The CHAIRMAN. Thank you.

You are now excused, if you wish to leave.

Judge **Rafeedie**. Thank you.

The **Chairman**. We will now have Judge David D. Dowd, Jr., come around.

We have already put your biography in the record.

I have just been informed by our chief investigator, Mr. Duke Short, that Miss Nancy Scott, of our judiciary staff, worked for the law firm that Judge Dowd was associated with. Is that correct?

TESTIMONY OF JUDGE DAVID D. DOWD, JR., NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Judge **Dowd**. That's correct.

The **Chairman**. She recommends you very highly.

Judge **Dowd**. I am pleased. It shows what a small world it is.

The **Chairman**. Judge Dowd, you served on the Ohio Fifth District Court of Appeals from 1975 to 1980, and as justice of the Ohio Supreme Court from 1980 to 1981. How do you feel this experience will assist you in performing the duties of a Federal district court judge?

Judge **Dowd**. Mr. Chairman, I think that to begin with, those experiences helped me to develop judicial skills that I think are transferrable to the Federal judiciary.

I might add that at the request of the chief justice of the Ohio Supreme Court, I did extensive trial work even when I served on the court of appeals by assignment, so I have a considerable time dealing with juries and lawyers in disputed fact situations. I think those skills are transferrable.

In addition, the Ohio Supreme Court, which has rulemaking authority under the Ohio constitution, has developed various rules of procedure in civil cases, in criminal cases, and developed the rules of evidence, and in every case they have been patterened after the Federal Rules of Civil Procedure and the Federal Rules of Evidence, so I think the information and experience I have had in that field are likewise transferrable.

The **Chairman**. Judge Dowd, would you please explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern?

Judge **Dowd**. In those situations where it appears that there might be a conflict of interest, or it might be raised, I would notify counsel of record of the existence of the potential conflict and ask input from them.

There are certain areas where I feel it imperative to disqualify myself. In cases that my present law firm would be involved in, I would automatically disqualify myself, and several of my clients that I have represented on a very close basis I would disqualify myself if they were a party before the court.

I have played a major role in representing a manufacturing company in Canton, and I would certainly not undertake to participate in any case that they might be involved in that would come before my court.

I also have a brother who practices with a rather large firm in Cleveland, Ohio, and I have indicated to the committee that in the event his firm is involved in litigation before my court, that I would notify all counsel of record of the fact of the relationship and that I would have the case transferred unless everyone that was a party of record waived any claim that they might have to my participating in that case.

The CHAIRMAN. I recently introduced the Violent Crime and Drug Enforcement Improvement Act of 1982. This bill, among other things, calls for sentencing reform. The major features of this provision include setting forth the purpose of sentencing and changing the sentencing system to a determinate sentence with no parole and limited good time credits.

A seven-member Sentencing Commission would be responsible, subject to review by Congress, for promulgating sentencing guidelines for the courts to use in determining an appropriate sentence. The court would be required to explain the basis for any sentence outside the guidelines.

Would you give me your thoughts on the need for sentencing reform, and would you care to express an opinion on the provisions I have outlined?

Judge DOWD. Thank you. I guess I would start with reviewing the Ohio system that I am familiar with.

In Ohio, we have judicial discretion in sentencing, but within very precise limitations. We have described our crimes as various degrees of felonies, and we have given to the trial court discretionary sentencing on the lower end of the sentence, given them four choices, and the amount of the sentence goes up as the crime becomes more serious, and then there is always a maximum sentence that the court is required to pronounce.

So there are more specific guidelines than the Federal laws require.

In my view, that is a wise choice, I think that the legislature should have rather precise input into what the sentencing philosophy of the people is, and not give to the court just unfettered discretion with respect to sentencing.

As a judge, I would appreciate having more specific pronouncements, or legislative standards, than presently exist in many cases. So I would believe that the legislation that is contemplated, which is proposed, would be a step in improvement.

In sentencing, I think there is too much inconsistency in sentencing in the Federal judicary because of the rather unlimited discretion given the trial courts, and I think it may well be time to tighten up that discretion.

The CHAIRMAN. Judge Dowd, in response to the committee questionnaire regarding judicial activism, you stated in part:

> If the tendency toward judicial activism is to continue, our representative constitutional form of government will be increasingly jeopardized.

Would you mind elaborating on this statement, and explain the phrase "judicial activism," and just what it means to you?

Judge Dowd. Well, to state it simply——

The CHAIRMAN. I liked your answer, but I just thought for the record you might expand it.

Judge DOWD. Thank you. To state it simply, I believe judicial activism is the usurping by the judiciary of the legislative or executive actions, or both. The reason I find fault with it is that I believe our constitutional forefathers conceived a brilliant form of government which rests primarily on the concept of separation of powers, and to the extent that the judiciary takes action which impinges upon that separation of powers, I do think it jeopardizes our form of government, which has taken us a long way in 200 years, and that is, I guess, the basis of my just basic criticism of the concept.

The CHAIRMAN. Judge Dowd, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than the one where the framers of the legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Judge DOWD. No.

The CHAIRMAN. Is there anything else you would like to say in these hearings?

Judge DOWD. Mr. Chairman, I want to say to you and to the committee that I am deeply appreciative of the confidence that the Ohio congressional delegation has shown in me, the fact of my nomination and the courtesies that have been extended to me by your staff and by you, and I must say that I am, God willing, and this committee willing and the Senate willing, I am most anxious to go to work as a U.S. district judge. I am honored by the opportunity.

The CHAIRMAN. Well, we are glad to have you with us, and we wish you successful and happy service on the Federal bench.

I can't imagine a finer job than to be a Federal district judge. You get the drama of the courtroom. You get to try cases. You deal with humanity. You do so much good. Ninety-eight or ninety-nine percent of the actions are final, and never appealed, and a good judge, a good, honest, right-thinking judge, I think, is in a position to do the country as much good as almost anybody I know.

Now, do you have any family members here that you would like to introduce?

Judge DOWD. Mr. Chairman, unfortunately, my wife, whom I would have loved to have had with me, is quite busy with her employment, and was unable to be here, and my children are scattered to the four winds with their educational responsibilities.

The CHAIRMAN. I believe that completes the hearing, unless somebody has something else. If not, we stand adjourned.

(Whereupon, at 2:36 p.m., the committee adjourned, to reconvene subject to the call of the Chair.)

BIOGRAPHIES

EDWARD RAFEEDIE

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: January 6, 1929, Orange, N.J.

Legal residence: California.

Marital status: Married to Ruth Alice Horton.

Education: 1946–47—Los Angeles City College; 1954–55—Santa Monica College; 1955–59—University of Southern California Law Center, B.S. and J.D. degrees.

Bar: 1960—California.

Military service: 1950–52—U.S. Army, honorable discharge.

Experience: 1960–66—Private practice, Santa Monica, Calif.; 1966–69—Kurlander, Solomon & Hart, Santa Monica; 1969–71—Municipal Court of the Santa Monica Judicial District; 1971 to present—Superior Court of California, County of Los Angeles.

DAVID D. DOWD, JR.

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Birth: January 21, 1929, Cleveland, Ohio.

Legal residence: Ohio.

Marital status: Married to Joyce Bevan Dowd, four children.

Education: 1947-51—College of Wooster, B.A. degree; 1951-54—University of Michigan Law School, J.D. degree.

Bar: 1954—Michigan and Ohio.

Military service: 1955-57—U.S. Army, Judge Advocate General Corps.

Experience: 1954-55, 1957-75—Dowd & Dowd, Massillon, Ohio; 1961-67—Assistant prosecuting attorney, Stark County; 1967-75—Prosecuting attorney, Stark County; 1975-80—Judge, Ohio 5th District Court of Appeals; 1980-81—Justice, Ohio Supreme Court; 1981 to present—Black, McCuskey, Souers & Arbaugh, Canton, Ohio.

CONFIRMATION HEARING ON:

RAYMOND L. ACOSTA AND JAMES C. FOX

WEDNESDAY, SEPTEMBER 22, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 2:30 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senator East.

Staff present: Duke Short, chief investigator; Bill Christensen, and Allan Spence, investigators; and Pamela Swanner, investigative clerk.

NOMINATION OF RAYMOND L. ACOSTA AND JAMES C. FOX

The **CHAIRMAN**. The committee will come to order. We have a hearing today for two U.S. district court judges, Raymond L. Acosta of Puerto Rico to be U.S. district judge for the District of Puerto Rico, and Mr. James C. Fox of North Carolina to be U.S. district judge for the Eastern District of North Carolina.

Now, we have Senator Helms here and Senator East here. I know how busy they are, so we will take them first. Would you gentlemen like to proceed? Senator Helms, you are the senior Senator. Would you like to lead off?

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator **HELMS**. Thank you, Mr. Chairman. It is not only a pleasure, it is an honor to be here to participate in anything in which the distinguished Senator from South Carolina is connected. Mr. Chairman, the President of the United States has done a uniquely beneficial thing in nominating as U.S. judge for the Eastern District of North Carolina, Hon. James Carroll Fox, to whom I shall hereafter refer to as Jim Fox, inasmuch as he is a long-time friend and a gentleman whom I have admired.

Jim Fox's impressive credentials are well known to the members of this committee. He is a native of North Carolina. In 1950 he was graduated from the University of North Carolina with a degree in business administration and began a business career as vice president of Dillard Paper Co. in Wilmington, N.C. He later enrolled in the University of North Carolina School of Law and was graduated with honors in 1957. And while there, he was a member of the board of editors of the North Carolina Law Review and a member of the Order of the Coif.

Following his graduation, he served as a law clerk to Hon. Donald Gilliam, U.S. judge for the Eastern District of North Carolina. In 1958 he joined the firm of Carter & Murchison; and in 1960 became a partner in Carter, Murchison & Fox, the predecessor to his present firm, Murchison, Fox & Newton.

Jim Fox has served as president of the New Hanover County Bar Association, secretary of the Fifth Judicial District Bar, president of the Law Foundation of the University of North Carolina, and director of the University of North Carolina Law Alumni Association. He is a member of the North Carolina State Bar and the American Bar Association. He served his community as New Hanover county attorney from 1967 through 1981.

In light of this extensive professional experience, I can recommend Jim Fox wholeheartedly to this committee as a man who possesses the professional qualifications necessary to serve on the Federal bench.

Aside from his professional credentials, Mr. Chairman, Jim Fox possesses the personal characteristics I believe this committee is seeking in nominees to the Federal bench.

Jim Fox is a dedicated Christian, and has served his church community as senior warden. He currently serves on the vestry of the St. James Espiscopal Church.

Over the years, Mr. Chairman, Jim Fox has given freely of his time to worthy causes. He served as campaign chairman and president of the United Fund, which of course is now known as the United Way; he has served as chairman of the Troop Committee of Boy Scout Troop 213; as president of the Bradley Creek School PTA; as a member of the Board of Directors of the Family Service Society; Board of Directors, New Hanover School for Mentally Retarded Children; Board of Directors, Thalian Hall Commission, Inc.; Advisory Committee of the School of Medicine—Division of Education and Research in Committee of the Medical Care of the University of North Carolina at Chapel Hill; associate director, Cornelia Nixon Davis Nursing Home, Inc.; Board of Directors, St. John's Art Gallery; Board of Directors, Services for the Aging, Inc.; and Board of Directors, North Carolina Children's Home Society.

Probably the wisest and most fortunate move Jim Fox ever made was to persuade Katherine deRossett Rhett to be his bride. They have three fine children, James C. Fox, Jr., Jane Fox Brown, and Ruth Fox Jordan. Best of all, he and Mrs. Fox have five grandchildren. Judging from my own experience as a grandfather, I know his grandchildren must be the joy of this life.

Mr. Chairman, I could go on and on about Jim Fox. But let me sum up by saying this: Jim Fox is a good man, a man of integrity, and a fine American. He is principled and dedicated. And, as I have said before, he will serve with distinction.

Therefore, it is my privilege to present to this committee a fine American whose ability and dedication have been recognized by the President of the United States, and in fact, by all who know him. On behalf of the President of the United States, it is my honor to present Hon. James Carroll Fox, and in so doing I extend to him my best wishes for a successful new career.

The CHAIRMAN. I am glad to have you with us, Senator Helms. Now, Senator East, we will be glad to hear from you.

STATEMENT OF HON. JOHN P. EAST, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator EAST. Mr. Chairman, I appreciate the opportunity and the honor to be here, and I have a statement that I would appreciate being made a part of the record.

Just a few general comments, so as not to unduly delay your proceedings here—I would simply like to underscore what my distinguished senior colleague has said. We are most impressed with the quality of this nominee. Otherwise we would not be here. We think he does great honor to the people of our State and ultimately, of course, to the Federal judiciary.

As Senator Helms has indicated, in his legal education he was right at the top; he was a member of the Order of the Coif, which, as you know, Mr. Chairman, involves the top 10 percent of the law graduates of an institution. He graduated from the University of North Carolina Law School at Chapel Hill; he served on the Law Review, which is the highest honor you can get as a law student; and he graduated with honors from law school. So his legal education is impeccable.

He has since earned a reputation as a practicing attorney that is outstanding.

The press in North Carolina explored his background thoroughly, as they should, and they reported uniformly across the political spectrum and from all aspects of the legal profession what an outstanding record he had as a practicing attorney.

So all the credentials are there in terms of his education and his experience to serve on the Federal bench.

Finally, and just as important, I think there are his personal qualities: he is a person of great integrity, great ability, great judicial temperament, and I daresay one could find few, if any, flaws in this man's background, experience, education, and qualifications.

And these are the kinds of people that we would like to have recommended from North Carolina, and we commend the President for his nomination. And I know it is an honor for Senator Helms and I to be associated with these proceedings this afternoon.

So I wish to congratulate Jim Fox and thank the chairman for the expeditious conduct of these hearings.

Thank you, Mr. Chairman.

[The prepared statement of Senator East follows:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I am very pleased to appear today to speak in support of Jim Fox's nomination as judge for the United States District Court for the Eastern District of North Carolina. As a member of the Committee on the Judiciary, I have been especially concerned about the quality, character and temperament of the men and women serving as federal judges. In this time of increasing litigation in the federal courts, it is essential that federal judges have the excellent academic and legal background necessary to comprehend the complex and varied issues that are being adjudicated. However, it is equally important if not more important that federal judges possess the high degree of integrity and sense of self-restraint that can guarantee respect for the judicary.

Mr. Chairman, it is reassuring to know that Jim Fox possesses these qualities which are such a necessary prerequisite for a nominee to the federal judiciary. He has served the public with distinction as County Attorney of New Hanover County, North Carolina for fourteen years from 1967-1981. In addition to these public responsibilities, he has maintained a highly respected legal practice as a partner in the Wilmington, North Carolina firm of Murchison, Fox & Newton. Jim has been associated with the firm for more than twenty years, having first joined it in 1958, following a clerkship with the Honorable Donald Gilliam, a judge in the U.S. District Court for the Eastern District of North Carolina.

Prior to this impressive legal career, Jim Fox excelled academically at one of the finest schools in the nation, the University of North Carolina. He was awarded a Bachlor of Science Degree in 1950 and then later enrolled in the University's Law School in 1955. He was awarded his LL.B. degree in 1957.

Jim is married to Katharine Rhett Fox and has three children.

The CHAIRMAN. Mr. Fox, I just want to say you are to be complimented to have been chosen by these able Senators. Senator Helms is chairman of the Committee on Agriculture here, and he is held in high esteem by the Members of the Senate. Senator East here is a member of this Judiciary Committee; he is highly respected. And both of these Senators are back of you, and I know it gives you great consolation and satisfaction. You couldn't have two finer men to support you.

Mr. Fox. I heartily agree, and I am deeply honored.

The CHAIRMAN. I am going to excuse them now, if they wish to go; or they can stay, if they want to—whatever they want to do.

Senator EAST. Thank you, Mr. Chairman.

Senator HELMS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Raymond Acosta, if you will come up with Congressman Corrada. Former Governor Ferre is here, and if he wishes to come up with you, we would be glad to have him do so. And Rafael Capo, Deputy Counsel to the Vice President, if he wishes to come up, we would be glad to have you, too, come up.

Now, we would be pleased, Congressman, to hear from you.

STATEMENT OF HON. BALTASAR CORRADA, RESIDENT COMMISSIONER FROM THE COMMONWEALTH OF PUERTO RICO

Mr. CORRADA. Thank you, Chairman Thurmond, members of the committee. My name is Baltasar Corrada, Resident Commissioner from Puerto Rico, and, as such, Puerto Rico's sole elected Representative in the U.S. Congress. I have the pleasure of introducing to you a good friend, Raymond Acosta, and I would like to briefly set forth some of the reasons why I am appearing today in support of his nomination to be U.S. district judge for the District of Puerto Rico.

I have known Mr. Acosta both personally and in his professional capacity for many years. He studied at Princeton University and is a graduate of Rutgers Law School in New Jersey. He also served honorably in the U.S. Navy in the Second World War.

I find him highly qualified for this position, given his strong professional background and impeccable moral character. His numerous positions in the Federal Government as special agent for the FBI, assistant U.S. attorney for the District of Puerto Rico, and his present position as U.S. attorney for the District of Puerto Rico vouch for his integrity, reliability, and fine performance throughout the years.

In addition, Mr. Acosta's expertise in business matters, acquired during his successful 15 years as vice president of two of our local banking institutions make him a well-rounded candidate who will certainly reflect upon the judicial system.

I want to point out that Mr. Acosta is a somewhat unique nominee. In 1980, he was nominated by President Carter for the position he currently holds. Today, only 3 years later, he reappears before this committee with a nomination from President Reagan to be U.S. district judge for the District of Puerto Rico. His vast qualifications gain him this bipartisan support and I am sure will lead him to excel in his new job on the Federal bench.

I endorsed his nomination when President Carter nominated him, and it is a pleasure to do it again today. And I commend President Reagan for using his wisdom in choosing Mr. Acosta for this highly demanding position.

Thank you, Mr. Chairman.

The **Chairman**. We are very pleased to have you with us, and I am sure your high recommendation of Mr. Acosta is greatly appreciated by him, and we are very pleased to have you to present him to this committee on this occasion.

Mr. **Corrada**. Thank you, Mr. Chairman.

The **Chairman**. Now, do these other gentlemen want to say a word?

Governor Ferre, do you want to say a word?

STATEMENT OF HON. LUIS A. FERRE, FORMER GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO

Governor **Ferre**. Yes, I am greatly honored to be here before you and this committee of the Senate, and I can also vouch for the excellent qualities of Mr. Raymond Acosta to serve our country in the Federal post that he has been nominated for. I have known him for over 25 years. He has worked with me when I was Governor, very ably, and also we worked together on the Status Commission of the U.S. Government between Puerto Rico and the United States when the status was being discussed here in the U.S. Congress.

So I know him very well. I am sure he will be a man that will do his duty with great excellence and to the best service of the United States and justice.

The **Chairman**. Thank you very much. Very pleased to have you here, and you made a fine record as Governor. I know your splendid endorsement here adds greatly to the record.

Governor **Ferre**. Thank you, sir.

The **Chairman**. Mr. Capo, did you care to say anything in behalf of the appointee?

STATEMENT OF HON. RAFAEL CAPO, DEPUTY COUNSEL TO THE VICE PRESIDENT

Mr. **Capo**. Yes, sir. Thank you, Senator, I am deeply honored to be here to support Raymond Acosta for U.S. district judge for Puerto Rico. Judge Acosta, I know, is fully compatible with President Reagan's policy on judicial restraint, et cetera, and I am very honored to be here with him. And I know that he will honor the high standards of the Federal judiciary in Puerto Rico.

Thank you, Senator.

The **Chairman**. Glad to have you with us, and your endorsement here will add greatly to his credentials.

Now, we will ask you to stand up and be sworn.

[Mr. Acosta stands and raises his right hand.]

The **Chairman**. The testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. **Acosta**. I do.

The **Chairman**. Now, if any of you people here who have endorsed him wish to leave, feel free, or you are welcome to stay.

Mr. **Corrada**. Thank you, Mr. Chairman, I would rather be excused. I am a House conferee to the conference on the Unemployment Training Act, and I have to go back with your colleague, Senator Hatch.

The **Chairman**. We certainly understand and appreciate your coming over.

Mr. **Corrada**. Thank you, Mr. Chairman.

The **Chairman**. Now, Mr. Acosta, do you have any members of your family here you would like to introduce, or special friends who are here with you?

Mr. **Acosta**. Yes, Mr. Chairman, I have my wife of 25 years, Marie.

The **Chairman**. We are pleased to have you here. I believe you did like I did—you married a young lady.

Mr. Acosta, you have served as U.S. attorney for the District of Puerto Rico since 1980, I believe.

Mr. **Acosta**. That's correct, sir.

The **Chairman**. Do you feel that this experience will be beneficial to you as a Federal judge, and, if so, how?

TESTIMONY OF RAYMOND L. ACOSTA, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF PUERTO RICO

Mr. **Acosta**. Well, Senator, as you know, as U.S. attorney, I have been called upon to handle the various types of cases, both civil and criminal, in defense and prosecution of the interests of the United States. And I would say that I am completely familiar with the courtroom setting, and also familiar with the rules of evidence and the procedure which is very essential, I think, to the administration of justice.

The **Chairman**. Mr. Acosta, I recently introduced the Violent Crime and Drug Enforcement Improvement Act of 1982. This bill, among other things, calls for sentencing reform. The major features of this provision include setting forth the purpose of sentencing and changing the sentencing system to a determinate sentence with no parole and no limited good time credits. A seven-member sentencing commission would be responsible, subject to review by Congress, for promulgating sentencing guidelines for the courts to use in determining an appropriate sentence. The court will be required to explain the basis for any sentence outside the guidelines.

Mr. Acosta, would you give me your thoughts on the need for sentencing reform, and, if you would care to express yourself on the provisions of this bill, if you are familiar with it.

Mr. Acosta. Well, Senator, given the fact that there is a noticeable lack of uniformity in sentencing by the judiciary, because they have a tendency to use their own standards from time to time, and are not generally required, as I understand it, to give a justification for their sentences, I would say, without having the opportunity to study this bill completely, that offhand I personally do not see any objections to such a bill, or even requiring a judge to have to give justification for making a sentence outside the guidelines that would be set up by the Congress.

The Chairman. Do you feel this would be helpful?

Mr. Acosta. As I say, without having studied the bill completely, I feel that it would probably be very helpful.

The Chairman. In your experience as prosecuting attorney, I thought you would have firsthand knowledge of the importance of sentencing reform.

Mr. Acosta. Yes, sir.

The Chairman. Mr. Acosta, a subcommittee of the Judicial Conference of the United States is considering a proposal that would require judges to close criminal trials whenever they believe openness might prejudice a jury. This same proposal will allow judges to order the media not to report certain procedures and to hold news organizations in contempt of court for violating such an order. Media organizations have argued that it violates Supreme Court rulings as well as the judiciary's policymaking procedures. The Supreme Court did, in the 1980 Richmond newspaper's opinion, rule that the first amendment requires open trials, except in extraordinary circumstances, although it did not identify those circumstances.

Mr. Acosta, would you give me your views on the advisability of having closed trials on the proposed action that is being recommended by some subcommittee.

Mr. Acosta. Senator, frankly, I hesitate really to offer any comments concerning a bill in the Congress, particularly with first amendment ramifications. I also don't believe it would be——

The Chairman. This is just being studied by a subcommittee of the Judicial Conference.

Mr. Acosta. I was going to add that I don't believe that, as a judicial nominee, that it would be proper for me to offer any opinions, personal opinions, as to the advisability or nonadvisability of a bill which is properly before a legislative body.

The Chairman. Mr. Acosta, in response to a portion of the committee's questionnaire concerning judicial activism, you stated in part:

> A tendency by the judiciary to impose itself upon other institutions in the manner of an administration with continuing oversight responsibilities only serves to take away from the judiciary the time it needs to interpret the law. The business of the judiciary is the administration of justice, not governance. The engagement of judges in the ideological, legislative, and operational executive activities not only violates the separation-of-powers doctrine, it impedes performance of the judiciary's proper role.

Mr. Acosta, are there ever any circumstances where your court might have a continuing administrative responsibility to oversee the implementation of one of its orders, and, if so, what are the standards that you would use in reaching that decision?

Mr. **Acosta**. I don't contemplate any circumstances where my court would be involved in the overseeing and administration. And with respect to guidelines or standards, I believe you said, I would be guided by the standards that would be set up by the Congress.

The **Chairman**. We have three branches of government—the Congress makes the law, the executive branch headed by the President administers the law, and the third branch, the judicial, interprets the law.

Do you believe that those should be the proper functions, as provided in the Constitution, and that the different branches of government should stay within their own powers?

Mr. **Acosta**. Most emphatically, Senator, most emphatically.

The **Chairman**. There are some judges that are running school districts, some of them are running hospitals, they are passing out orders and taking over institutions, and it has always impressed me that they are going beyond their authority. And it is an extension of Federal power that I feel should be avoided.

How do you feel?

Mr. **Acosta**. I wholeheartedly agree, Senator.

The **Chairman**. That will be all. Judge Acosta, we hope you have a nice tenure on the bench, and we wish you success in your new work.

Mr. **Acosta**. Thank you very much, Senator.

The **Chairman**. We will now excuse all of you, and ask the next nominee to come up, Mr. Fox.

Mr. Fox, you can come around and be sworn, please.

[Mr. Fox stands and raises his right hand.]

The **Chairman**. The testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. Fox. Yes, sir.

The **Chairman**. Have a seat, Mr. Fox. Do you have any of your family or friends here?

Mr. Fox. No, Senator, I do not.

The **Chairman**. Mr. Fox, recently the American Bar Association repealed its longstanding prohibition on the use of television, still cameras, and tape recorders in courtrooms. In its place, the association's house of delegates said that judges should be able to authorize the unobtrusive use under carefully prescribed rules.

Mr. Fox, would you give me your opinion of the appearance of television cameras in the courtroom.

TESTIMONY OF JAMES C. FOX, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NORTH CAROLINA

Mr. Fox. Senator, I don't know what the carefully prescribed rules would be, nor have I studied any papers on this subject, but my feeling would be that television might very well prove to be distractive to the jury, to the witnesses, and to the attorneys and the court, and that it also might tend to introduce into advocacy an element of theatrics unless the use of cameras was very closely controlled. I believe it would require a great deal of study and a great deal of experience in order to arrive at a final determination of the matter.

But I would feel that there would be areas that would certainly have to be closely examined.

The CHAIRMAN. Mr. Fox, do you believe it would be helpful to you as a judge to have a sentencing commission to establish uniformity in sentencing?

Mr. Fox. I think a sentencing commission would be helpful as an advisory group to establish uniformity. I also believe that in any particular or individual case that the circumstances of that case would have to be weighed very carefully, taken into consideration even when utilizing advice from a sentencing commission.

The CHAIRMAN. The sentencing commission that is outlined in the bill now pending would fix limits, and the judge would have to explain either way if he went too far.

Does that sound reasonable?

Mr. Fox. That sounds reasonable to me. He would certainly have to justify sentencing to himself, and he should be in a position to justify it to others.

The CHAIRMAN. Mr. Fox, Chief Justice Burger in his 1981 year-end report on the judiciary wrote:

> I hope Congress will promptly consider limiting federal collateral review of State court convictions to claims of manifest miscarriages of justice. The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases.

A portion of the problem addressed by the Chief Justice is the increase in the writ of habeas corpus by State prisoners seeking to overturn State court convictions in Federal courts. In fact, in 1980 prisoner petitions comprised approximately 14 percent of all U.S. district court civil litigation filings.

Mr. Fox, do you feel there is a need to alter the degree of access to Federal courts by State prisoners, and, if so, what recommendations in this area would you make?

Mr. Fox. I agree that it would be desirable to place limitations on collateral review where the State court decisions have been rendered by courts of competent jurisdiction, and I believe that for collateral review to be justified it would require unusual circumstances which would manifest a distortion of justice that would warrant such collateral review.

The CHAIRMAN. Mr. Fox, your response to the portion of the committee's questionnaire concerning judicial activism stated in part: "A court should not exercise jurisdiction over a case which is fictitious in nature, instituted solely for the purpose of obtaining a judicial opinion on a point of law, when not involved in an actual controversy between the parties."

Mr. Fox, what would you consider a proper subject for adjudication by the court?

Mr. Fox. I would regard as the subject of proper adjudication only a case in which there was an actual grievance existing between parties, a justiciable controversy that would involve the decision, the administration of justice, as between them. I do not think that the court should be involved in establishing political policies. I do not believe that it should allow itself to be used for such a purpose. The courts are not the elected representatives of the people, and I think they should interpret the law and not make it.

The CHAIRMAN. How do you feel about judges exercising legislative powers, as some of them have attempted to do, or exercising executive powers in some cases, as some have attempted to do?

Mr. FOX. I don't believe that is their proper function, and I don't believe the Constitution provides for it.

The Chairman. We are glad to have you with us. We hope you enjoy your service on the bench.

Mr. Fox. Thank you very much, sir.

The Chairman. I believe that completes the hearing, so we now stand adjourned.

[The committee adjourned at 2:57 p.m.]

BIOGRAPHIES

RAYMOND L. ACOSTA

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF PUERTO RICO

Birth: May 31, 1925, New York, N.Y.

Legal residence: Puerto Rico.

Marital status: Married to Marie Hatcher de Acosta, 3 children.

Education: Drew University (V-12 Program), Princeton University (V-12 Program); 1946-47—University of Missouri; 1947-51—Rutgers University School of Law, LL.B degree.

Bar: 1953—New Jersey; 1959—Puerto Rico.

Military service: 1944-46 U.S. Navy, honorable discharge.

Experience: 1953-54—Private practice, Hackensack, N.J.; 1954-58—Special agent, FBI; 1958-61—Assistant U.S. attorney, District of Puerto Rico; 1961-62—Baker & Woods, Hato Rey, P.R.; 1962-66—Igaravidez & Acosta, San Juan, P.R.; 1966-67—Vice president and manager, IBEC Real Estate Services, Inc., Rio Piedras, P.R.; 1967-78—Senior Vice President and Trust Officer, Banco Credito y Ahorro Ponceno, San Juan, P.R.; 1978-80—Vice president, Banco Popular de Puerto Rico, Hato Rey, P.R.; 1980 to present—U.S. attorney, District of Puerto Rico.

JAMES C. FOX

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NORTH CAROLINA

Birth: November 6, 1928, Atchison, Kans.

Legal residence: North Carolina.

Marital status: Married to Katharine Rhett Fox, 3 children.

Education: 1946-50—University of North Carolina, B.S. degree; 1955-57—University of North Carolina School of Law, LL.B degree.

Bar: 1957—North Carolina.

Experience: 1957-58—Law clerk to Hon. Donald Gilliam, U.S. District Court, Eastern District of North Carolina; 1958-present—Murchison, Fox & Newton (formerly Carter & Murchison), Wilmington, N.C.; 1967-1981—County attorney, New Hanover County, N.C. (part-time).

CONFIRMATION HEARING ON GEORGE G. FAGG

WEDNESDAY, SEPTEMBER 29, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 2:48 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Grassley.

Staff present: Bill Cristensen and Allan Spence, investigators; and Pamela Swanner, investigative clerk.

NOMINATION OF GEORGE G. FAGG

The **CHAIRMAN**. We meet today to consider the nomination of Judge George G. Fagg of Iowa, to be U.S. circuit judge for the Eighth Circuit Court of Appeals.

Judge, we are glad to have you with us. However, I will ask you to stand up and be sworn.

The testimony that you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth?

Judge **FAGG**. It will be.

The **CHAIRMAN**. Have a seat.

Now, do you have any members of your family that you want to introduce?

Judge **FAGG**. No.

The **CHAIRMAN**. Without objection, we will place a copy of your biography in the record.

Now, in order to save the time of these Senators because they are very busy, we are going to let them make their statements and then I can question you after they have left. Although they are welcome to stay if they wish to for the full hearing.

The senior Senator, Senator Jepsen, we will be glad to hear from you.

STATEMENT OF HON. ROGER W. JEPSEN, A U.S. SENATOR FROM THE STATE OF IOWA

Senator **JEPSEN**. Thank you, Mr. Chairman.

It is a pleasure to be here this afternoon before you and your distinguished committee concerning the nomination of Judge George G. Fagg of Marshalltown, Iowa, to be a judge of the Eighth Circuit Court of Appeals.

I have known Judge Fagg for several years. He is eminently qualified to be a member of the court of appeals. His commonsense, highly professional approach to his current job as judge of the Iowa District Court, Second Judicial District, has earned him wide respect in judicial circles. He has served in that position since 1972. Judge Fagg was admitted to the bar in 1958 and practiced with the law firm of Cartwright, Druker, Ryden & Fagg in Marshalltown, Iowa, until 1972.

Judge Fagg is a member of several professional organizations, including the National Association of Trial Judges, Iowa Judges Association, the American Bar Association, and the Iowa State Bar Association. He is chairman of the Committee on Iowa Uniform Jury Instructions and a member of the supreme court advisory committee on the rules of civil procedure. He is also a lecturer at both Drake University Law School in Des Moines and the University of Iowa Law School. While a student at Drake Law School, he was the editor of the Drake Law Review.

Judge Fagg is also a very active member of his community. He is currently a board member, trustee and teacher of the Methodist Church. He has been a board member or officer of the many different organizations, including the YMCA, the United Way Campaign, the chamber of commerce, the city zoning commission, the city planning commission, tuberculosis association, and the Little League.

George G. Fagg is the type of individual that America needs in the service of the judiciary. He is a well-rounded individual, Mr. Chairman. He is a father, husband, community member, a lawyer and a judge. And as I stated earlier, his commonsense, his highly professional approach to solving legal problems is highly respected by all who know him. It is the type of approach which America needs now. He is married and he has six children.

I highly recommend Judge George G. Fagg of Marshalltown, Iowa, to you and to the country. Thank you, Mr. Chairman.

The CHAIRMAN. Glad to have you with us, Senator.

We will now hear from the junior Senator from Iowa, Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I am happy to join you and Senator Jepsen in welcoming Judge Fagg to the committee. It is a pleasure to have him as the President's nominee to fill this vacancy on the Eighth Circuit Court of Appeals.

The record today is going to be replete with references to Judge Fagg's outstanding legal and judicial career which began with his graduation at the top of his class from Drake University Law School. So I will not elaborate on that point.

I would, however, like the committee to know about the tremendous outpouring of support that Judge Fagg has received from his home community. In choosing our Federal judges, particularly for a bench as important as this one, we must seek jurists not only of high legal qualifications, qualifications which can be fairly easily quantified, but also those of strong personal character, a trait which is more difficult to ascertain within the investigative powers of the U.S. Senate. A character of a man who is best judged by those who know him best.

I want this committee to know that those who know Judge Fagg the best, the people of his home community in Marshalltown, Iowa, are unanimous and exuberant in support of his nomination.

I have received literally hundreds of letters from individuals, and these have been unsolicited communications from people in that area, telling me not only what a good judge George Fagg is but, also what kind of a person he is. They tell me he is a man of the highest character who would serve with the dignity appropriate to this high bench.

That is all I have to comment on now except, Mr. Chairman, for one personal comment that Judge Fagg visited with me in my district office in Waterloo, Iowa, about 6 months ago where I had an opportunity to question him for the first time. Even though I knew him personally, and even though I knew him as an outstanding judge. I had not visited with him about his judicial philosophy. I asked him as best a farmer can many of those concerns that I had about a judge who is going to be appointed to this high court, the Eighth Circuit Court of Appeals, about his judicial philosophy. And I came away from that meeting with him knowing that if he were the one that the President decided to nominate out of several highly qualified people in the State of Iowa, that he would have my full support. And I am here this time, for the first time now that he has been nominated, to tell you, Mr. Chairman and the members of this commmittee, that he has my full support and that he is going to he the sort of a person I want with the judicial philosophy that I want on the Eighth Circuit Court of Appeals.

Thank you, Mr. Chairman.

The **Chairman**. I want to express my appreciation to you Senators for coming and endorsing Judge Fagg so highly. And, Judge Fagg, I want to tell you that both your Senators are men of high reputation, they are men of honor, men of integrity, and their presence here endorsing you personally will carry great weight with this committee and with the entire Senate. You are fortunate that both your Senators are taking a strong stand for you.

Judge **Fagg**. I am very appreciative and gratified by the remarks, Mr. Chairman, and thank them.

The **Chairman**. If they wish to stay, they are welcome to stay. If not, I will proceed with the questioning.

Judge Fagg, you served as a district judge for the Iowa District Court, Second Judicial District, from 1972 to the present.

How do you feel this experience will assist you in performing the duties as a Federal circuit court judge?

TESTIMONY OF GEORGE G. FAGG, NOMINEE, U.S. CIRCUIT JUDGE, EIGHTH CIRCUIT COURT OF APPEALS

Judge **Fagg**. First, the Iowa rules of evidence, procedure, administrative review are comparable to the Federal rules and approach, and I would not find myself as a stranger to the requirements of the Federal bench.

Second, during my 10 years as a judge, I have demonstrated and have a reputation for deciding cases by application of applicable law in a detached fashion to the facts without subjective considerations being involved.

Third, as a trial judge, although the term may be misleading, my post requires the writing of many written opinions that could best be described of an appellate nature, and in our State there is no supporting staff for a judge and hence I have developed a strong practice and capability for independent research.

And, lastly, I represent the grassroots point of view by having served in an extensive 22-county district as a trial judge. I believe that a judge who has been close to the people with the grassroots point of view can bring an approach to the Federal appellate bench that will blend very nicely with the approaches of the other judges and enhance the ability of that court to perform its role.

The CHAIRMAN. I guess you have a position in your State, a position there of district judge is the highest trial court in the State?

Judge FAGG. That is correct.

The CHAIRMAN. Has the power of death in criminal cases and unlimited jurisdiction in civil cases?

Judge FAGG. It has unlimited criminal and civil jurisdiction. Iowa does not have the death penalty at this time.

The CHAIRMAN. Judge, what kind of guidelines should a Federal judge follow in determining propriety of Federal intervention into State affairs, and are you concerned about strong advocates of public issues being appointed to the Federal bench?

Judge FAGG. In response to the first part of your question, I would say three criteria would be applicable.

First, adherence to the constitutional requirement of justiciability.

Second, the exercise of judicial restraint by the judge.

And, third, the utilization of the equitable remedies of the court only in those cases where such utilization can effectively solve the problem that is before the court.

In response to the second part of the question, from my standpoint, I do not believe that a judge should engage in policymaking on the bench; a judge should not introduce his personal leanings into the matter of making judicial determinations. Policymaking is for the people's representatives through their duly elected representatives in the legislative and executive branches, and I would not involve my personal leanings in serving as a Federal judge.

The CHAIRMAN. Thank you.

Judge Fagg, I recently introduced the Violent Crime and Drug Enforcement Improvement Act of 1982. This bill, among other things, calls for sentencing reform. A major feature of this provision includes setting forth the purposes of sentencing and changing the sentencing system to a determinate sentence with no parole and limited good time credits. A seven-member sentencing commission would be responsible subject to review by Congress for promulgating sentencing guidelines for the courts to use in determining an appropriate sentence. The court would be required to explain the basis for any sentence outside the guidelines.

Judge Fagg, would you give me your thoughts on the need for sentencing reform in the provisions that I have outlined?

Judge FAGG. Whether or not such legislation is desirable or should be implemented is a legislative decision.

I might mention that Iowa is following your lead in that during the last session of the general assembly, steps were implemented to go to the determinate sentence, the elimination of parole, and restrictions upon the type of credits for time served. Observations were made that the indeterminate sentence and the prison place-ment for rehabilitation is not as effective an approach as utilization of prison placements for punishment purposes with the prison resident knowing exactly the length of stay and eliminating the questionable success of parole programs.

Those are the discussions that went on in our State during the last session of the legislature, and if the legislature determines that that this is the desirable practice for the judiciary to follow in handling the sentencing of individuals, I would certainly support and apply such legislation to the best of my ability.

The CHAIRMAN. Judge Fagg, another provision of the Violent Crime Act calls for a minimum effective bail reform. Some of the major features are: It takes into consideration the danger to the community in determining whether the defendant should he released pending trial; it tightens criteria for postconviction release pending sentencing appeal; it provides procedures for revocation of release and contempt of court prosecution for committing crimes while on release; it provides consecutive sentences for crimes committed on pretrial release; it increases penalties for bail jumping.

Judge Fagg, would you give me your comments on the provisions that I have just outlined concerning the need for bail reform?

Judge FAGG. The concern about the individual that is released pending trial, that has dangerous characteristics, without the statutory authorization to consider those characteristics in determining whether or not the individual is entitled to pretrial release, is common to the trial bench. For myself, it is a subject of great concern.

In Iowa, our statutes do not allow us, in determining pretrial release arrangements, to weigh whether or not the individual we release may be dangerous to the community while he or she is awaiting trial. The same concerns are at hand in that interval of time between jury verdict and sentencing and appellate decision.

I would welcome such legislation, and it certainly would have a place in the hands of the trial bench in dealing with the bail arrangements.

The CHAIRMAN. Judge, in response to a committee question concerning judicial activism, you stated, in part, "The criticisms involving 'judicial activism' should underscore constructively to a Federal judge that there are measurable limits to Federal judicial power."

Judge, would you discuss in detail some of the measurable limits that you are referring to?

Judge FAGG. The limitations that I was referring to are set forth in the three paragraph response that I included in my response to the questionnaire of this committee. And if I can refer to that discussion in answering your question, Mr. Chairman, I will do so.

The CHAIRMAN. Well, if you like, that could be inserted as your response here.

Judge FAGG. Thank you.

The CHAIRMAN. Judge, you informed the committee that judicial intrusion into the affairs of institutional administration should be minimum and, in most instances, the details of bringing the institution into compliance with the Constitution should remain with the administrators.

Judge, what are the standards that you will use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge FAGG. In my response, I was trying to convey my feeling that where there is a constitutional violation, it should be the responsibility of the administrators to take all of the corrective steps that are necessary to bring the operation of the facility into conformity with constitutional requirements. The only limitation I can think of where a court would not give such a full rein to the administrators would be in that case where patent bad faith is demonstrated by the administrators, in advance, making it inescapably clear that even if the court returns the responsibility to the administrators fully to restructure their operation to conform with the Constitution, there is not the slightest intent on their part to comply.

The CHAIRMAN. Some judges have taken it upon themselves to take charge of school districts, hospitals, and other State institutions or local institutions, and have injected themselves into matters that most people feel belong to the State, and that the State authorities should handle.

What is your opinion about the matter?

Judge FAGG. I agree that the State authorities should be charged with the responsibility to maintain their institutions and to the extent that the administration has to be altered, to bring it into conformity with the constitution, it should be their responsibility fully to carry that out without intervention or interference or any type of continuing administration by the Federal bench.

I believe it is safe for us to trust the State administrators to perform their duties under the Constitution, the same as they expect the Federal bench to perform its duties the same way.

The CHAIRMAN. Judge, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of the provision or its surrounding legislative history?

Judge FAGG. No. When the Federal bench is required to interpret the Constitution or to interpret legislation, the Federal judiciary is not sitting in the first instance upon the matter. Instead, the Federal judiciary is overseeing the performance by others of their constitutional responsibilities. The intent of the Constitution will have to prevail and the intent of the legislative body in enacting the statute that is under consideration will have to control.

The personal leanings, the viewpoints, and the subjective feelings of the Federal judiciary are not to be taken into account.

The CHAIRMAN. Judge, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflict with the Constitution as that judge interprets it?

Judge FAGG. Senator, do you mind reading the question again, repeating your question?

The CHAIRMAN. Yes. What is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge unterprets it?

Judge **Fagg**. The precedents of the court upon which the judge sits must yield to the dictates of the Constitution.

The **Chairman**. Now, if some district judge interprets the Constitution one way and if you felt it was a wrong interpretation as a member of the circuit court of appeals, I presume you would feel free to reverse that decision if you did not agree with the proper interpretation as you saw it?

Judge **Fagg**. Yes.

The **Chairman**. I do not think I have any other questions.

Senator Grassley, do you have any questions you would like to ask the judge?

Senator **Grassley**. Yes.

Judge Fagg, one of the new controversies in the legal profession is the new draft, professional code of ethics, which was recently held over for a later vote by the house of delegates of the American Bar Association.

Will you comment on the merits of this new code?

Judge **Fagg**. I have not followed the development of the new code in the American Bar Association sessions for one reason.

As you know, Iowa has, by Supreme Court mandate, an Iowa code of professional responsibility and so notwithstanding any action the American Bar Association would take on the code that is under consideration, it would not be applicable to the lawyers in Iowa until the Supreme Court adopted it. And at that point I would become very familiar with it, because it is my practice to insist that the lawyers practicing before me comply with the mandates of the code of professional responsibility just as they expect me to comply with the canons of judicial conduct applicable to my behavior.

Senator **Grassley**. If there is anything further you would like to add on that, we could receive that in writing.

My second question. Now, there are currently pending before Congress proposals to eliminate Federal diversity jurisdiction. With your experience as a State court judge, would the elimination overburden the State court system?

Judge **Fagg**. It would certainly increase the caseload, but I personally favor the return of the cases, the civil cases that fit within the diversity jurisdiction to the State court system for two reasons.

One, it will release the burden from the Federal courts at the trial level; and, second, most of these cases are of a type that the State trial bench is familiar with and capable of handling. And since they basically involve occurrences that are in close proximity of the State trial courthouses, I see no reason why they should not be tried in the State system.

Senator **Grassley**. Recently, several Supreme Court Justices have commented on the tremendous workload of the Supreme Court due to the explosion of litigation taking place in our country.

For example, the incident of a little girl and the crackerjack toy which was raised by the president of ABA.

Do you have any suggestions on how to solve this problem, the problem of workload?

Judge **Fagg**. I would not have any suggestions nor feel that it would be appropriate for me to make suggestions to the Supreme Court of the United States as to how to deal with their workload.

I will say this. In the last American Bar Association journal, two of the Justices commented on this very point. Justice Stevens, I believe, made the observation that perhaps the judges were going to have to reexamine the doctrine of judicial restraint to avoid unnecessary lawmaking, and Justice Powell made the observation that as to the endless habeas corpus proceedings involving the rehash of criminal trials that have emanated from the State court system, perhaps lack of finality in that area must come to an end by drawing lines so that appeals would only be entertained if it was a matter of the ultimate question, that is guilt or innocence. Otherwise, the cases would come to an end in the State court system as I interpreted Justice Powell's remark, and not enter the Federal system.

It is apparent the Justices are thinking about the problem that you have in mind.

Senator **Grassley**. Mr. Chairman, I have no further questions.

The **Chairman**. I do not believe there are any other questions.

Judge, we thank you for your appearance. We hope you enjoy your service on the bench and wish you well.

Judge **Fagg**. It is an honor to be here. Thank you very much.

The **Chairman**. We will now stand in adjournment. I belive that is the only matter that we have.

[Whereupon, at 3:15 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHY

George G. Fagg

NOMINEE, U.S. CIRCUIT JUDGE, EIGHTH CIRCUIT COURT OF APPEALS

Birth: April 30, 1934, Eldora, Iowa.

Legal residence: Iowa.

Marital status: Married to Jane E. Wood Fagg, 6 children.

Education: 1952-56—Drake University, B.S. degree; 1956-58—Drake University Law School, J.D. degree.

Bar: 1958—Iowa.

Legal experience: 1958-72—Boardman, Cartwright, Druker & Fagg (formerly Boardman, Cartwright & Druker), Marshalltown, Iowa; 1972 to present—District Judge, Iowa District Court, 2nd Judicial District.

CONFIRMATION HEARING ON:

REGINALD W. GIBSON, HALDANE ROBERT MAYER, AND LAWRENCE S. MARGOLIS

WEDNESDAY, DECEMBER 1, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:07 p.m., in room 2228, Dirksen Senate Office Building, Hon. Charles E. Grassley presiding.

Staff present: Duke Short, chief investigator; Bill Christensen, investigator; and Pamela Swanner, clerk.

NOMINATION OF LAWRENCE S. MARGOLIS, REGINALD W. GIBSON, AND HALDANE ROBERT MAYER

Senator GRASSLEY. This meeting of the Judiciary Committee is called to order to consider the nominations of Claims Court judges, Mr. Lawrence S. Margolis, of Maryland, to be a judge of the U.S. Claims Court; Mr. Reginald W. Gibson of Illinois, to be a judge of the U.S. Claims Court, and Mr. Haldane Robert Mayer, of Virginia, to be judge of the U.S. Claims Court.

I would like to start out with Senator Percy, and call Senator Percy and his constituent, Mr. Reginald W. Gibson, to the table.

Senator Percy, we would like to invite you to make a statement for the record at this point.

STATEMENT OF HON. CHARLES H. PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator PERCY. I thank you, Mr. Chairman.

I will be very brief indeed, because a Presidential nominee's record speaks for itself.

I am very pleased of having the opportunity to introduce Reginald Gibson to the Judiciary Committee and to you, Mr. Chairman, for the hearing on his nomination by the President of the United States to the U.S. Court of Claims.

Mr. Gibson is a resident of Palatine, Ill., and is a distinguished member of the Illinois bar. He received his law degree from Howard University School of Law in 1956, having already received his degree in business administration from Virginia Union University in 1952.

An accomplished and recognized tax attorney, Mr. Gibson began his career as a trial attorney in the Tax Division of the U.S. Department of Justice. In 1971, he moved to Illinois, where he became a senior tax attorney with the International Harvester Co. He was later promoted to the position of general tax attorney for that major firm, and has served there until this year.

I think Mr. Gibson's education and experience have prepared him well for a Court of Claims judgeship. He is highly regarded by his colleagues in business. I have had calls from International Harvester, from his colleagues, acclaiming to his skills, his abilities, integrity, his judgment, and his understanding of the law, and he is highly regarded also by his peers in the legal profession. I have every faith that he will distinguish himself on the bench, and I commend Reginald Gibson to the committee.

I thank you, Mr. Chairman, very much indeed.

Senator **Grassley**. I thank you for your testimony and support for Mr. Gibson.

Mr. Gibson, we will now call Senator Sarbanes and his constituent and nominee, and then I will call you back, Mr. Gibson.

I would like to put in the record the biographical history of Reginald W. Gibson, the nominee to the Claims Court, so without objection, that will be entered.

Senator **Grassley**. Senator Sarbanes, we appreciate your coming. I know your constituent appreciates it as well, and at this point, we would hear your statement in regard to the nominee.

STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator **Sarbanes**. Thank you very much, Mr. Chairman.

I am pleased to appear before the committee today to introduce Lawrence Margolis of Silver Spring, Md., to the committee and to strongly recommend his confirmation to serve on the U.S. Claims Court. He will bring to that Court an outstanding record of professional practice and public service.

Larry Margolis graduated from Drexel University and the George Washington University Law School. He served as patent counsel with the U.S. Naval Ordinance Laboratory; was Assistant Corporation Counsel in the District of Columbia, and in the private practice of law. He then served in the U.S. Department of Justice as a trial attorney; served as a consultant to the President's National Crime Commission, and from 1968 through 1971, was an assistant U.S. attorney for the District of Columbia. In 1971, he was named a U.S. magistrate for the District of Columbia and was unanimously reappointed in 1979 to a second 8-year term as a magistrate for the District of Columbia, reappointed by the District Court Judges.

I think it is important to note that during his professional life and career, Larry Margolis has also been an active participant in his community. His professional involvement has included election to the board of directors of the National Council of U.S. Magistrates and as president-elect of the George Washington University Law School Alumni Association. He also received the American Bar Association Judicial Administration Division Award for Distinguished Service as chairman in 1980 and 1981.

I think his entire professional career and his private life have exhibited the qualifications which merit this appointment to serve on the U.S. Claims Court, and I very strongly recommend him to the committee.

Senator **Grassley**. Thank you, Senator.

At this point, as well, I would ask Mr. Margolis to retire so I can call Senator Warner, if he would like to come, and at this point, I would like to also submit for the record a statement by Senator Mathias of Maryland, in support of the nomination of Mr. Margolis. That will be entered in the record at this point, and also, I would like to submit for the record without objection the biographical information on Mr. Margolis, nominee for the Claims Court.

[The prepared statement of Senator Mathias follows:]

Prepared Statement of Senator Charles McC. Mathias, Jr.

I regret that I am unable to be present to greet Mr. Margolis. It is always a source of great pride to a Senator when the President chooses to appoint one of his constituents to high public office. It is particularly gratifying when that person is so eminently qualified for the position.

So, today I am doubly pleased to commend to my colleagues the nomination of Lawrence S. Margolis to the U.S. Claims Court.

Mr. Margolis brings a breadth of valuable experience and exceptional qualifications to this job, and has achieved a distinguished record of service in the federal courts. In addition to nearly twelve years as U.S. Magistrate for the District of Columbia, Mr. Margolis has served as Assistant U.S. Attorney for the District of Columbia, Assistant Corporation Counsel for the District of Columbia, Criminal Division Attorney for the Department of Justice, and Patent Examiner with the U.S. Patent Office.

Noteworthy among Mr. Margolis' particular qualifications for the Claims Court is his pre-law training in aeronautical and mechanical engineering, as well as his service as Patent Counsel in the U.S. Naval Ordnance Laboratory.

Mr. Margolis has also provided distinguished leadership in his profession, having served as the Chairman of the Judicial Administration Division of the American Bar Association.

Mr. Chairman, I am confident that Lawrence S. Margolis will give outstanding service to this court, and I am pleased to urge his nomination.

Senator **Grassley**. Thank you, Senator Warner, for coming in support of your nominee, and at this point, we would ask you for your statement.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. Thank you, Mr. Chairman.

It is my pleasure to introduce Robert Mayer, nominated by the President to be a judge on the U.S. Claims Court.

With Mr. Mayer today are his wife, Mary Anne, and one of his daughters, Anne, and I wonder, Mr. Chairman, if we might ask them to stand and be recognized.

Senator **Grassley**. Yes, please do. And if you had not done that, I was going to do that. All the other candidates' families can be prepared to respond as well.

But we know that you are proud of your families' accomplishments, and we welcome you here. I know it is a historymaking day in your family.

Proceed.

Senator **Warner**. Thank you, Mr. Chairman.

After graduating from law school at the College of William and Mary—where, incidentally, he was first in his class, and editor-in-chief of the Law Review—Mr. Mayer clerked for Judge John D.

Butzner Jr., with the Court of Appeals for the Fourth Circuit. Mr. Mayer attended law school at his own expense while he was serving on active duty in the U.S. Army. He has the record of being the first Army officer on active duty to be a law clerk to a U.S. Circuit Court Federal Judge. He completed his military service in the Army, Judge Advocate General's Corps, gaining considerable experience as a trial lawyer.

When he left the Army, he continued as a trial and litigation lawyer in Charlottesville, with one of Virginia's most prestigious firms, McGuire, Woods & Battle, and taught trial advocacy skills at the University of Virginia Law School.

Mr. Mayer returned to Government service in 1977, when Chief Justice Warren Burger selected him to be his special assistant. He held that unique position for the next 3½ years, acquiring an insight into our Federal judicial processes and developing skills especially suited for being a judge.

In 1980, Mr. Mayer resumed litigation practice with the law firm of Baker & McKenzie and remained until he accepted the challenge of being deputy special counsel, and for a time, acting special counsel, for the U.S. Merit Systems Protection Board. In these positions, he was again able to apply his legal skills in Government service.

I am especially pleased to be able to present Bob Mayer to the members of the committee, because he has demonstrated a longstanding dedication to his Nation. He is a 1963 West Point graduate, serving in his career in combat positions and staff positions. During his 12½ years as both a line officer and a lawyer, he obtained valuable experience directly applicable to the work of the U.S. Claims Court.

Following active duty, the nominee remained in the Army Reserve, where he is now a lieutenant colonel, and has been certified by the Judge Advocate General as a trial judge in the military courts.

I am convinced that Mr. Mayer's Government service and civilian experience, both legal and nonlegal, his integrity, his impeccable character, and his dedication to the ideals of fair justice, equal justice to all, have prepared him well to assume the responsibilities of a judicial post.

I thank you, Mr. Chairman.

Mr. Mayer, you are now on your own.

Mr. **MAYER**. Thank you very much, Senator Warner.

Senator **GRASSLEY**. Mr. Mayer, if you would like to stay at the table, I will start with you.

Thank you, Senator Warner.

I would like to submit for the record a copy of the biographical information on Mr. Mayer.

Senator **GRASSLEY**. If you would stand, Mr. Mayer, for swearing, would you raise your right hand? Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **MAYER**. I do.

Senator **GRASSLEY**. Thank you. You may be seated.

TESTIMONY OF HALDANE ROBERT MAYER, NOMINEE, JUDGE, U.S. CLAIMS COURT

Senator GRASSLEY. I would also like to ask, even though your family has been acknowledged, if you would like to identify the members who are here we would appreciate it.

Mr. MAYER. Thank you, Mr. Chairman.

My wife, Mary Anne, is here, and my older daughter, Anne. My younger daughter, 7-year-old Rebecca, could not be here today because she has the chicken pox. She claims it is the worst day of her life for that reason.

Senator GRASSLEY. If you have a statement that you would like to make, now is the time for you to do that, and then I have some questions that I wish to ask you.

Mr. MAYER. Mr. Chairman, I would only like to say that I am deeply honored by the President's confidence in nominating me for this position. I look upon it as a tremendous challenge, and I am anxious to get to the court and begin the work.

Senator GRASSLEY. Mr. Mayer, my first question deals with the jurisdiction of the new Claims Court, it includes limiting the authority to issue preaward injunctions in Government contract cases. Do you believe that sufficient standards exist to guide the Claims Court judges in the exercise of this authority?

Mr. MAYER. Yes, sir, I do. I believe the Federal courts, generally, the Federal district courts and the Federal courts as a whole, have developed and evolved equitable remedies over the years. It is a continuing process, but I believe those standards are directly applicable to the equitable jurisdiction of the Claims Court and could be imported with relative ease. So I believe the standards are sufficient.

Senator GRASSLEY. New paragraph 3 of 28 U.S.C. 1491, appears to give the Claims Court what is referred to as exclusive jurisdiction to grant equitable or extraordinary relief in preaward contract actions. Do you anticipate any conflict between the U.S. district courts and the Claims Court in the exercise of this jurisdiction?

Mr. MAYER. I would not anticipate any conflicts. I am aware of that provision, and I believe it will have to undergo judicial interpretation. But I expect that would come in cases before the U.S. district courts, rather than before the U.S. Claims Court.

Senator GRASSLEY. Mr. Mayer, how has your experience and background prepared you for the position of U.S. Claims Court judge?

Mr. MAYER. Mr. Chairman, I believe my exposure to the Federal judicial system and the courts, as a law clerk for Judge Butzner on the Court of Appeals, and the 3½ years as special assistant to the Chief Justice has given me a firm start. My trial and litigation experience in both Government and with private law firms have prepared me for a trial-level judgeship. I would think the exposure I have had in Government, primarily to the administrative procedures and administrative law would be helpful. Also, I have taken graduate courses in some of the substantive areas that are the types of cases that will come before the Claims Court. So I would think that that experience would stand me in good stead at this court.

Senator **Grassley**. My last question deals with the subject of specialization. To avoid specialization by the Court of Appeals for the Federal circuit, the Federal Court Improvements Act requires that a rotation system for random assignment of cases be established. Do you think a similar svstem should have been specifically imposed under the act on the U.S. Claims Court and its judges?

Mr. **Mayer**. I do not believe that it would be necessary for a statutory rule to that effect. As I understand it, the Claims Court now has an internal rule of procedure that does rotate the cases at random among the judges, and that would avoid the problem of overspecialization. Yet it allows the court to retain flexibility in light of change in circumstances. So I would not think it necessary that the legislation include that provision.

Senator **Grassley**. I have no further questions, but I do want to suggest to you that, under standard procedure, you may receive some questions in writing from members of the committee who cannot be here. And I will say to you, Mr. Mayer, as well as the other two nominees, that we might have specific questions that we would like to have you answer in writing.

Also, I would like to explain that Chairman Thurmond normally would be presiding over this very important nominations hearing, but he is floor-managing S. 995 on the Senate floor, probably the most important antitrust piece of legislation in this Congress, and that is why he is not able to be here. But he spoke to me about the importance of this meeting and wanted me to extend his best wishes to you, and thank you for understanding his inability to be here.

Mr. Mayer, I have no further questions. I want to congratulate you on your nomination, and feel that this committee is going to try to expedite these nominations very quickly.

Thank you very much.

Mr. **Mayer**. Thank you, Mr. Chairman.

Senator **Grassley**. I now call Mr. Margolis of Maryland. Also, before you seat yourself, I would like to have you raise your hand so I can swear you in. Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Margolis**. I certainly do.

Senator **Grassley**. Thank you, Mr. Margolis. You may be seated. We would like to have you introduce to us any of your family members, or relatives, or friends that you have here at this momentous occasion in your life.

Mr. **Margolis**. Thank you very much, Senator.

I do have with me today my dear wife, Doris Margolis.

Senator **Grassley**. Congratulations to you as a family member, as well.

Mr. **Margolis**. I might add, without her help, assistance, and encouragement, I probably would not be here today. I owe everything to her. I wanted to also introduce my secretary, Marilyn Meyers, and my law clerk, Judith Keith. Also, I have a future law clerk here, Tom Catliota.

Senator **Grassley**. We would welcome your statement or any other points you want to make at this time.

TESTIMONY OF LAWRENCE S. MARGOLIS, NOMINEE JUDGE, U.S. CLAIMS COURT

Mr. MARGOLIS. I, too, like Bob Mayer, am deeply honored that the President nominated me for this position, and I can assure you, I promise to do my very, very best if confirmed by the Senate.

Senator GRASSLEY. I have a few questions I would like to ask you. The interlocutory jurisdiction of the new Court of Appeals for the Federal circuit does not permit review of Claims Court decisions on liability before the quantum of damages has been determined in a case. Do you believe that this will adversely affect the productivity of the Claims Court?

Mr. MARGOLIS. I believe to some extent that the productivity of the Claims Court may be affected because the trial judge will be required to hold the trial both on the issue of liability and damages, instead of just liability only.

In the U.S. district court, the judge can try the issue of liability first and then the losing party may appeal only on that issue to the U.S. court of appeals. Thus, a long and costly trial on a damage issue that may take several weeks is avoided.

I would respectfully suggest that possibly, the Federal Courts Improvement Act be amended to permit the Court of Appeals for the Federal Circuit to review decisions of the U.S. Claims Court when only the issue of liability has been determined.

Senator GRASSLEY. If you have any specific thoughts on particular, specific amendments, the committee would be very interested in having those, and I would suggest to you that you submit those to us in writing. We would appreciate it very much as we consider that legislation.

Mr. MARGOLIS. Thank you.

Senator GRASSLEY. Do you foresee any particular benefits or problems arising out of the nationwide jurisdiction of the U.S. Claims Court?

Mr. MARGOLIS. I believe the nationwide jurisdiction of the U.S. Claims Court will minimize the inconvenience and expense to litigants. The Claims Court can, if convenient, hold court in the counties where the witnesses reside. This provision allows the judge to travel to the place where most of the witnesses reside to try the case, thus saving the parties time and money.

Senator GRASSLEY. As I asked Mr. Mayer, I would like to ask you how your experience and background prepared you for the position that you have been nominated to, to the U.S. Claims Court.

Mr. MARGOLIS. As Senator Sarbanes indicated, I have been a U.S. magistrate for the District of Columbia for the past 12 years, and in that position, I have tried many contract and patent cases. These cases are a significant part of the caseload of the Claims Court. I have handled many pretrial motions and numerous pretrial conferences and settlement conferences. I hope that this kind of trial experience as a judicial officer will assist me in my position on the Claims Court if I am confirmed.

Senator GRASSLEY. Do you anticipate any problems in the operation of the new court as a result of the recent Supreme Court decision in the *Northern Pipeline Construction Company* v. *Marathon Pipeline Company* case?

Mr. **Margolis**. My answer to that question is probably "No." The *Northern Pipeline* case, decided by the U.S. Supreme Court in June of 1982, declared the establishment of bankruptcy Courts under article I of the Constitution to be unconstitutional. Although frankly, the issue is somewhat sensitive, because I might very well be called upon to decide that issue if confirmed as a Claims Court Judge, the Supreme Court did note in its decision that courts empowered by Congress to hear only cases in which the United States is a party represents a valid exercise of its article I power to create courts to adjudicate public rights. I leave it to future cases to determine the authority of the Claims Court in that area.

Senator **Grassley**. I have no further questions. I want to congratulate you on your nomination, and I know you will serve the people of this country well.

Thank you very much.

Mr. **Margolis**. Thank you so much, Senator. I appreciate it.

Senator **Grassley**. I would like to call now Mr. Gibson. Would you raise your right hand, Mr. Gibson? Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **Gibson**. I do.

Senator **Grassley**. Thank you.

Would you please be seated. Do you have anybody in the audience that you would like to introduce?

Mr. **Gibson**. Not today, Mr. Chairman.

Senator **Grassley**. We appreciate that. We also appreciate the fact that you had to come further than anyone else, and that air tickets are not all that inexpensive anymore.

We would like to have you make any opening statement or points that you would like to make, and then I have a few questions that I would like to ask you, as well.

TESTIMONY OF REGINALD W. GIBSON, NOMINEE, JUDGE, U.S. CLAIMS COURT

Mr. **Gibson**. Mr. Chairman, I would like to state for the record that I am most grateful for the nomination by the President. It is indeed a privilege and an honor. This is the culmination of a career that I had planned. I have always wanted to be a judge, and if I make it I shall endeavor to acquit myself in a manner befitting that office.

Senator **Grassley**. Thank you.

Mr. Gibson, how has your experience or background prepared you for the position of U.S. Claims Court Judge?

Mr. **Gibson**. Mr. Chairman, as the record shows, I have approximately 20 years of service in the Federal Government. Following my graduation from law school, I served 5 years as an Internal Revenue agent here in Washington, D.C. In such capacity, I had the responsibility of auditing individual, corporate, and all other types of income tax returns. In addition, following 5 years at the Internal Revenue Service, I served 10 years in the Tax Division, Criminal Section, U.S. Department of Justice, as a trial attorney. In that capacity, I prosecuted a substantial number of organized crime cases, as well as cases involving defendants in high and sensitive places. Such trials in most instances involved jury trials, none of which lasted less than 4 weeks. I submit that that exposure in the U.S. district courts in a number of jurisdictions throughout the United States, gives me the sense of bearing as to what is required of a Federal judge.

Also, following my tenure at the Department of Justice, I served 11 years as the chief tax attorney for International Harvester Co. In that capacity I had primary responsibility with respect to all of the company's State and Federal tax litigation. This position required that sound and considered judgment be exercised in determining the type of cases that should be litigated.

In substance, I respectfully submit that, collectively, approximately 26 years of tax work, in very difficult and complex areas, have given me the sense of balance and experience that is required for that office.

Senator **Grassley**. What standards of conduct and ethics will guide you during your tenure as a Claims Court judge?

Mr. **Gibson**. Mr. Chairman, in all of my professional endeavors, I have always approached and resolved issues based on the operative facts and the applicable law. I think that such an approach is critical, and as a judge it will always guide me in reaching my decision.

Finally, I have always taken the position that in applying the law it is imperative that legislative intent be followed very closely, and I shall always endeavor to use that as a guidepost.

Senator **Grassley**. Thank you.

On another point, in the Trial Division of the present U.S. Court of Claims, some judges have become experts on certain types of cases, such as patents, and been assigned to cases to the exclusion of other judges. What do you feel should be the practice of the Claims Court in regard to this type of specialization?

Mr. **Gibson**. It might be said, Mr. Chairman, that specialization in the Claims Court might tend to deprive the court of its generalist character. On the other hand, I think that the random assignment of cases in the Claims Court might have the proclivity of obviating the kind of efficiency that might very well be needed at this posture.

It is important that the Claims Court get off to a fast and a very efficient start. It is my understanding that the workload of the court is extremely heavy. Given said fact, I think that the chief judge should, therefore, have the discretion in the assignment of cases, and utilize that discretion, to the end so as to facilitate the expeditious trial of cases.

The recent rules promulgated by the court, as I understand them, propose to require the assignment of cases on the basis of random selection. However, there is a provision therein which gives discretion to the chief judge to reassign cases as the exigencies of the circumstances may warrant, and I would assume that the chief judge will avail himself of that provision.

Senator **Grassley**. In the Trial Division of the present U.S. Court of Claims, trial judges prepare opinions in which they frequently present more than one alternative for decision, supporting each of these alternatives with extensive documentation. What do you believe to be the proper scope of an opinion in the new Claims Court?

Mr. **Gibson**. It is my judgment, Mr. Chairman, that the modus operandi that was utilized in the predecessor Court of Claims should not obtain in the Claims Court. I believe that the reason why multiple opinions and factfindings were made there was to give maximum aid to the judges of the U.S. Court of Claims.

Inasmuch as the Federal Court Improvement Act has given the Claims Court judges the power to make definitive judgments, I think it will be unnecessary for them to engage in such laborious exercises. It would appear to me that the standard for opinions of judges of the U.S. Claims Court should substantially track the opinions that issue from the U.S. district courts. Those opinions may—and often do—consist of facts that are either separately found or facts that are incorporated within the opinion. I think that either approach is appropriate and acceptable.

Senator **Grassley**. I have no further questions, and I want to congratulate you on your nomination, and I expect that the committee will act on it rather quickly.

We have no further business, so at this point, beyond congratulations and saying that the record will be open for a few days, I call the meeting closed.

[Whereupon, at 2:37 p.m., the committee was adjourned.]

BIOGRAPHIES

REGINALD W. GIBSON

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: July 31, 1927, Lynchburg, Va.

Legal residence: Illinois.

Marital status: Divorced, 1 child.

Education: 1948-52—Virginia Union University, B.A. degree; 1952-53—University of Pennsylvania, Wharton School of Finance; 1953-56—Howard University School of Law, LL.B. degree.

Bar: 1957—District of Columbia; 1972—Illinois.

Military service: 1946-47—U.S. Army.

Experience: 1957-61—Agent, Internal Revenue Service, Washington, D.C.; 1961-71—Trial attorney, Tax Division, U.S. Department of Justice; 1971-82—Tax attorney, International Harvester Co., Chicago, Ill.

HALDANE ROBERT MAYER

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: February 21, 1941, Buffalo, N.Y.

Legal residence: Virginia.

Marital status: Married to Mary Anne McCurdy Mayer, 2 children.

Education: 1959-63—U.S. Military Academy, West Point, N.Y., B.S. degree; 1968-71—Marshall-Wythe School of Law, The College of William & Mary, J.D. degree; 1972-73—Judge Advocate General's School, University of Virginia, diploma.

Bar: 1971—Virginia.

Military service: 1963-75—U.S. Army, honorable discharge; 1975 to present— U.S. Army Reserve.

Experience:1971-72—Law clerk to Hon. John D. Butzner, Jr., U.S. Court of Appeals, Fourth Circuit; 1973-75—U.S. Army, Ft. Knox, Ky., Judge Advocate General's Corps; 1975-77—McGuire, Woods & Battle, Charlottesville, Va.; 1977-80—Special Assistant to the Chief Justice of the United States, Warren E. Burger; 1980-81—Baker & McKenzie, Washington, D.C.; 1981 to present—Merit Systems Protection Board, Deputy Special Counsel.

LAWRENCE S. MARGOLIS

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: March 13, 1935, Philadelphia, Pa.

Legal residence: Maryland.

Marital status: Married to Doris May Rosenberg, 2 children.

Education: 1953-57—Drexel Institute of Technology, B.S. degree; 1957-61—George Washington University Law School, J.D. degree

Bar: 1963—District of Columbia.

Experience: 1957-61—U.S. Department of Commerce, U.S. Patent Office, Patent Examiner; 1962-63—Naval Ordnance Laboratory, Patent Advisor; 1963-66—Assistant Corporation Counsel, District of Columbia; 1963-66—Private practice, Silver Spring, Md.; 1966-68—Trial Attorney, Criminal Division, U.S. Department of Justice; 1966-67—Consultant, President's National Crime Commission; 1968-71—Assistant U.S. attorney, District of Columbia; 1971 to present—U.S. magistrate, District of Columbia.

CONFIRMATION HEARING ON:

FRANK W. BULLOCK, JR., FRANK X. ALTIMARI, PAUL E. PLUNKETT, JOSEPH V. COLAIANNI, ROBERT J. YOCK, AND CHRISTINE COOK NETTESHEIM

MONDAY, DECEMBER 6, 1982

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2:08 p.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Mathias and East.

Staff present: Duke Short, chief investigator; Bill Christensen, investigator, and Pamela Swanner, clerk.

NOMINATION OF FRANK W. BULLOCK, JR.

The Chairman. The committee will come to order.

We have a number of nominations here this afternoon. The U.S. district court judges, we will take first.

Are there any Senators here from New York, North Carolina, or Illinois; please raise your hands. All right. The two North Carolina Senators are here. We will take you first, then, if you will come around with your nominee from North Carolina, Frank W. Bullock, Jr.

Without objection, I will place the résumé of Frank W. Bullock, Jr. in the record, and it will speak for itself.

Now, Senator Helms, you and Senator East are here, and I will be very pleased to hear from you gentlemen at this time.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator Helms. Thank you very much, Mr. Chairman.

It is always a privilege to appear before this distinguished committee, and I especially appreciate the honor of presenting the Honorable Frank William Bullock, Jr., whom the President has nominated to serve as the U.S. district judge for the Middle District of North Carolina.

I have known Mr. Bullock personally for the better part of 2 decades. I have followed his career as one of our State's most respected attorneys, and I commend him to this committee as a dedicated American who is devoted to justice under the law and the Constitution, and as a citizen highly respected throughout North Carolina.

On a personal note, Mr. Chairman, I believe that both you and I may have met Mr. Bullock for the first time in 1964. You may recall that you came to North Carolina several times for appearances that year. Well, it was Mr. Bullock who served as your driver during a number of those 1964 visits to our State. He had been graduated a short time previously from law school, and I understand also that it was he who first introduced you to Dr. I. Beverly Lake who, in the years to follow, served with distinction as associate justice in North Carolina.

You have, as you have indicated, Mr. Bullock's biographical resume before you, and I know it will be made a part of the record of this hearing. Therefore, I will summarize only a part of it in the interest of time.

Frank Bullock was born in Oxford, which is in Granville County, N.C., on November 3, 1938, the son of Wilma Long and Frank William Bullock. His family has lived in Granville County for more than 200 years, and—and I must be careful about the number of "greats" here—but his great-great-great-great grandfather, Captain Micajah Bullock, was a well-known Revolutionary War officer and later sheriff of Granville County.

Mr. Bullock was educated in the public schools of that county. He was graduated in 1957 from Oxford High School, where he earned academic and athletic honors. He became an active member of the Oxford Presbyterian church.

He holds degrees in business administration and in law from the University of North Carolina in Chapel Hill.

Further summarizing—and I would say to the reporter that I hope that all of this will be printed in the record—he was appointed by North Carolina's Chief Justice R. Hunt Parker to be assistant director of the administrative office of the Courts of North Carolina, one of the two statutory positions charged with the responsibility of the overall administration of the court system of the State.

Now, Mr. Chairman, Frank Bullock has been active in the American Bar Association and the North Carolina Bar Association. He has lectured and written frequently on Federal practice and procedure for publication for both the North Carolina Bar Association and the Wake Forest University School of Law.

Interestingly enough—certainly to me—while being interviewed by the media concerning his philosophy, he characterized himself as a conservative, and stated that he believed the proper function of the U.S. district court is to apply the law as enacted by Congress and interpreted by the U.S. Supreme Court.

He has stated his firm belief in the separation of powers, and he has indicated strongly that policymaking should be left where it quite properly belongs, with the Congress.

Mr. Chairman, the surest measure of a man is his standing in his local community. Mr. Bullock's community has embraced him as, in the words of the Greensboro Record, as "a man for the job."

Therefore, Mr. Chairman, I am honored to present a fine, young American, whose ability and dedication have been recognized by the President of the United States and, in fact, by all who know him, the Honorable Frank William Bullock, Jr., to whom I extend my best personal wishes.

I thank the chairman.

The CHAIRMAN. Did you give just the highlights, or did you have a full statement?

Senator HELMS. I have a full statement.

The CHAIRMAN. If you will turn that over to the recorder, I will ask her to put the full statement in the record.

Senator HELMS. Thank you, Mr. Chairman.

[The prepared statement of Senator Helms follows:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

Mr. HELMS. Thank you very much, Mr. Chairman. It is always a privilege to appear before this distinguished committee, and I especially apprecitate the honor of presenting Mr. Frank William Bullock, Jr., whom the President has nominated to serve as U.S. district judge for the middle district of North Carolina.

I have known Mr. Bullock personally for the better part of two decades. I have followed his career as one of our State's most respected attorneys. I commend him to this committee as a dedicated American who is devoted to justice under the law and the Constitution, and as a citizen highly respected throughout North Carolina.

Mr. Chairman, I believe both you and I may have met Mr. Bullock for the first time in 1964. You may recall that you came to our State several times that year for speeches. Mr. Bullock served as your driver during a number of those 1964 visits to our State. He had been graduated a short time previously from law school. I understand that it was he who first introduced you to Dr. I. Beverly Lake who in the years to follow served with distinction as associate justice of the North Carolina Supreme Court.

You have Mr. Bullock's biographical resume before you, Mr. Chairman, and I assume it will be made a part of the record of this hearing. Therefore, I will summarize it in the interest of time.

Frank Bullock was born in Oxford, in Granville County, North Carolina, on November 3, 1938, the son of Wilma Long and Frank William Bullock, His family has lived in Granville County for more than two hundred years, and his great-great-great-great grandfather, Captain Micajah Bullock, was a well-known Revolutionary War officer and later sheriff of Granville County.

Frank Bullock was educated in the public schools of Granville County. He was graduated in 1957 from Oxford High School, where he earned academic and athletic honors. At an early age he became an active member of the Oxford Presbyterian Church.

He holds degrees in business administration and in law from the University of North Carolina in Chapel Hill. While in law school he was on the board of editors of the North Carolina Law Review and vice-president of his graduating class. Following graduation he was selected by the Honorable Algernon Butler, chief judge of the United States District Court for the Eastern District of North Carolina, to serve as law clerk. Following his clerkship, he joined the Raleigh law firm of Maupin, Taylor and Ellis.

In 1968 he was appointed by North Carolina's chief justice, R. Hunt Parker, to be assistant director of the administrative office of the courts of North Carolina, one of two statutory positions charged with the responsibility of the over-all administration of the court system of the State.

In 1973, he resigned this position to re-enter private practice in Greensboro with one of the oldest firms in the State, Douglas, Ravenel, Hardy, Crihfield and Bullock, of which he is now a partner. The senior partner in this firm, R. D. Douglas, Jr., is a great-grandson of the "little giant," Senator Stephen A. Douglas of Illinois.

During his practice in both Raleigh and Greensboro, Frank Bullock had extensive trial experience in both the State and Federal courts, both in and outside of North Carolina. He has appeared in the North Carolina Supreme Court, the North Carolina Court of Appeals, and the Fourth Circuit Court of Appeals on many occasions, and before many Federal regulatory and administrative agencies. Since 1973 the majority of his practice has been devoted to the Federal courts and Federal administrative and regulatory agencies. He has frequently represented clients before the National Labor Relations Board, the Equal Employment Opportunity Commission, the United States Department of Labor's Office of Federal Contract Compliance programs, the Occupational Safety and Health Administration, and the Wage and Hour Division of the United States Department of Labor. He has appeared frequently in the United States district courts in North Carolina and in other States.

He has been active in the American Bar Association and the North Carolina Bar Association. He has lectured and written frequently on Federal practice and procedure for publications of both the North Carolina Bar Association and the Wake Forest University School of Law.

Upon being interviewed by the media concerning his philosophy, he characterized himself as a conservative and stated that he believes the proper function of the United States district court is to apply the law as enacted by the Congress and interpreted by the United States Supreme Court.

He has stated his firm belief in the separation of powers and has indicated strongly that policy-making should be left where it quite properly belongs, with the Congress.

The surest measure of a man, Mr. Chairman, is his standing in his local community. Mr. Bullock's community has embraced him as, in the words of the Greensboro Record, "a man for the job."

Therefore, Mr. Chairman, I am honored to present a fine American whose ability and dedication have been recognized by the President of the United States—and, in fact, by all who know him, the Honorable Frank William Bullock, Jr., to whom I extend to him my best wishes.

The Chairman. Senator East, we will be glad to hear from you.

STATEMENT OF HON. JOHN P. EAST, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator East. Thank you, Mr. Chairman.

I appreciate the opportunity to appear here and speak very briefly on behalf of Mr. Frank W. Bullock, Jr., to be appointed U.S. district judge to the middle district of North Carolina.

My distinguished senior colleague here has indicated his strong support, and I simply wish to add my voice to it. Senator Helms and I have been most concerned that we appoint and recommend people for the President who are of the highest quality, and we feel that Mr. Bullock fully fits within that category.

I would like to point out that he has had an outstanding academic background. In law school, he served on the board of editors of the Law Review. Anyone who has been to law school knows that is the highest academic honor you can achieve. After graduating from law school, he served as a clerk for Hon. Algernon Butler, who was a distinguished judge of the U.S. District Court for the Eastern District of North Carolina.

Later, Mr. Bullock accepted a position with the Administrative Office of the Courts for the State of North Carolina, and subsequently, he served as assistant director and administrative assistant to the chief justice of North Carolina's Supreme Court.

He has been in private practice since 1973 in a very distinguished firm in Greensboro, N.C., under the name of Douglas, Ravenel, Hardy, Crihfield & Bullock.

My point is what, Mr. Chairman? He has an impeccable academic background. He has had extensive service with the courts, beginning with a clerk for a Federal district judge, and then subsequently has served with great distinction in the Bar, and I would like to submit, without unduly bragging here, that Senator Helms and I like to feel we have submitted a man who, on the basis of his record, has earned this honor, that it is not a "merely political patronage." I think the record speaks for itself, a great academic record, a great record of experience and service. And I can say first hand, he has the judicial temperament, he has the intelligence to serve on the Federal bench.

And so, it is with a great deal of pleasure, and it is my honor to be here with Senator Helms, to encourage his early approval by the Judiciary Committee, and I hope by the U.S. Senate.

Again, Mr. Chairman, I thank you for your distinguished leadership on this committee and giving me an opportunity to appear on behalf of Mr. Bullock. And I would appreciate it, Mr. Chairman, if my full statement here could be made a part of this record.

The CHAIRMAN. We will print your full statement in the record.

[The following was received for the record:]

[The prepared statement of Senator East follows:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I am pleased—and privileged—to support the nomination of Frank W. Bullock, Jr. to be a U.S. district judge for the Middle District of North Carolina. I believe Frank's nomination contributes to the strengthening and improvement of the quality of our judicial system.

Frank Bullock is a native North Carolinian who was born in Oxford and attended both college and law school in North Carolina. He received his B.S. degree from the University of North Carolina at Chapel Hill in 1961 and then received his LL.B. degree from the same school a short time later, in 1963. Because of his outstanding academic abilities, Frank was chosen to serve on the board of editors of the law review.

Since receiving his law degree, Frank has distinguished himself as an able and articulate attorney. From 1963 to 1965 he clerked for the Honorable Algernon Butler, a judge of the United States District Court for the Eastern District of North Carolina. In 1964, he entered private practice with the well respected firm of Maupin, Taylor & Ellis in Raleigh. He had made partner with that firm by 1968 and accepted a position with the Administrative Office of the Courts for the State of North Carolina. From 1968 to 1973, Frank served as Assistant Director and Administrative Assistant to the Chief Justice of North Carolina. He left these positions in 1973 to join as partner in the firm with which he currently serves: Douglas, Ravenal, Hardy, Crihfield & Bullock, in Greensboro.

During his legal career, Frank has published and spoken frequently on important public and legal issues. His knowledge of the law, the fineness of his analytical reasoning, and his innate understanding of human nature will undoubtedly make him a valuable addition to the Federal bench. I congratulate Frank on his nomination and wish him continued success.

The CHAIRMAN. Mr. Bullock, if you will stand and be sworn. Do you solemnly swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BULLOCK. I do.

The CHAIRMAN. Now, we have some other Senators here, so I think what we will do is let you step aside, and let us take the Senators, and then we will come back to you later.

I believe the next Senator I had here was the New York Senator, and then the Illinois judge. You are interested in the Court of Claims judges.

Mr. SHORT. Senator Warner is here, Mr. Chairman.

The CHAIRMAN. We will take you first, Senator Warner. We are glad to have you here.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, and I would ask that my entire statement be placed in the record.

It is my distinct privilege to introduce Mr. Robert Yock. Mr. Yock worked as a trial judge in the U.S. Court of Claims and as a judge of the U.S. Claims Court. Mr. Chairman, I think that his record is well-known and is documented before this committee.

He is joined today by his lovely wife, Carla, and their two children, Signe and Torunn.

Mr. Chairman, I ask that the balance of my statement be included in the record.

[The prepared statement of Senator Warner follows:]

Prepared Statement of Senator John W. Warner

Thank you, Mr. Chairman.

It is a distinct pleasure to introduce to the Committee this afternoon a Virginian who has been honored by the President as a nominee for the United States Claims Court, Mr. Robert Yock. I am pleased to also be able to welcome his lovely wife, Carla, and their two children, Signe and Torunn.

It is imperative that we give special scrutiny to the character and qualifications of those singled out for positions of important public trust. I am confident that the Committee's evaluation and action regarding Mr. Yock will reflect this commitment to excellence, and afford the nominee an opportunity to express his concerns as well.

The single most-important criterion, in my judgment, is that a nominee must have demonstrated clearly, during the course of a career, the personal commitment—if given the opportunity to sit in judgment of others—to dispense equal justice under the law for everyone.

The judicial robe, never an imperial robe, symbolizes the majesty of the law. Those who don it must always be conscious of the common, everyday humanity and dignity which binds us equally together. Never can a judge neglect or ignore the plight and problems of others—particularly the less-fortunate. A judge must have the capacity, largely through temperament and demeanor, to leave witnesses and litigants—irrespective of the outcome—with the feeling that they have been heard, listened to, and that justice has been rendered.

A judge's task demands persons of the highest order of intelligence, capable of interpreting the law, analyzing the issues, and making finds of fact. It demands integrity unquestioned, honesty unsullied. It demands a very special person—and Robert Yock is just such a person.

Beyond the fact that Mr. Yock has had the good sense to make his home in Virginia, he has compiled an impressive record of service to his profession and country.

Mr. Yock was educated at St. Olaf College, receiving a Bachelor of Arts Degree, Cum Laude. He then went on to post graduate studies, receiving a Juris Doctor from the University of Michigan Law School.

Mr. Yock finished his formal training in 1962. Since that time, his experience has spanned a broad array of private endeavors as well as dedicated public service to our nation.

Following his graduation from law school, Mr. Yock served on active duty in the United States Navy's Judge Advocate General's corps for four years. Since that time, he has served in the Naval Reserves, and currently holds the rank of Captain.

In addition to his military career, Mr. Yock has distinguished himself many times throughout his professional career. He has served in a variety of positions for the General Services Administration, and most recently has worked as a trial judge of the United States Court of Claims, and a Judge for the United States Claims Court.

Mr. Chairman, I am honored and pleased to present to my colleagues on this Committee, for your joint consideration, Mr. Robert Yock. I am confident that the Committee, in the course of its inquiry into his qualifications, will develop as I have the highest opinion of this outstanding individual.

Mr. Chairman, I thank you for this opportunity.

The Chairman. Thank you very much.

I want to say to Mr. Yock, and I will say it to the appointee from North Carolina, too, that you are fortunate to have such able and outstanding Senators here to represent you and recommend you. Senator Warner is held in high esteem by the Senate, and we are very pleased to have his remarks, and the same thing about the North Carolina Senators.

Senator **Warner**. Thank you for your graciousness, Mr. Chairman.

The **Chairman**. Senator D'Amato, would you like to present your judge, so it will not detain you?

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator **D'Amato**. Mr. Chairman, it is always a privilege and a pleasure to be before you and this distinguished committee, as evidenced by your interest, by your great sensitivity, in terms of those appointments that have come through under your leadership and under your chairmanship.

Mr. Chairman, it is indeed a great honor and privilege for me to be able to present to you a personal friend of long standing, a man whom I have known and have had the privilege to work with for more than 20 years, indeed, a true legal scholar; a lecturer at various universities; the chief administrator of more than 100 judges in Nassau County; a judge who has both experience in the criminal area and the civil area, serving in the highest court in New York of original jurisdiction, the State supreme court, where, as I have mentioned, he has risen to the ranks of the chief administrator of that court system.

I think it is worthy of note that Judge Altimari brings such a distinguished background, that he was appointed to this position in spite of the fact that he is a Republican, by a Democratic administration our State judicial court system. It is his character of love of the law, integrity, deep compassion and understanding that has made him the respected legal scholar that he is.

Mr. Chairman, I am delighted to present to this committee Judge Altimari and I know that be will make an outstanding district court judge, and I wish him the best of luck in this new endeavor.

I would ask, Mr. Chairman, that my remarks be entered into the record as if read in their entirety.

The **Chairman**. All right, sir, we are glad to have you. I want to tell Judge Altimari that Senator D'Amato is a comparatively new Senator here, but he has risen in the esteem of his colleagues, and they all hold him in great respect, and his recommendation, being in such high regard, will go a long way to help you.

We are very pleased to have you with us.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF SENATOR ALFONSE D'AMATO

Mr. Chairman, it is a distinct pleasure and indeed an honor to present to the Senate Judiciary Committee, Judge Frank Altimari for your consideration as the nominee for the position of Federal judge for the eastern district of New York.

President Reagan recognized the exceptional quality of this nominee when he personally called upon Judge Altimari to accept his nomination for this distinguished judicial position. My own judicial screening committee also heartily recommended Judge Altimari with a unanimous vote of confidence. He is eminently qualified to assume the responsibilities of the Federal judiciary. The Department of Justice fully concurred in this assessment of the judge in its own exhaustive examination of his credentials.

Mr. Chairman, I take particular pride in this nomination because Judge Altimari is a man I have known personally for many years. He is a true legal scholar, a temperate and thoughtful man perfectly suited to the Federal bench. He has served as a judge for some seventeen years, hearing both civil and criminal cases. Just last year he has designated as the administrator of the civil courts in my home county of Nassau, New York.

To all who have come to know him over the years, Judge Altimari has established an impeccable reputation as a fair and able jurist who has demonstrated a deep love for the law and an unparallelled sensitivity to the needs of the modern court system.

He is a respected scholar who has lectured at New York law schools and to the New York City Police Department. A graduate of Brooklyn Law School, he has enjoyed a long and illustrious career in the law, a career marked by a wealth of judicial experience.

I am delighted to present Judge Altimari to the committee, as a lawyer's lawyer and a judge's judge. It is my fervent hope that your honorable body will act expeditiously to approve his nomination and forward it to the full Senate for its speedy consideration.

The Chief Judge of the United States Court for the Eastern District of New York, Judge Jack B. Weinstein, has recently pointed out that it is essential that Judge Altimari begin his work as a Federal judge as soon as possible, due to the extensive backlog of cases in this court.

Thank you Mr. Chairman for your usual courteous and prompt dispatch of this important matter. I rest confident that the committee will find Judge Altimari well fit for the prestigious mantle it is in your power to place upon him.

The **Chairman**. Senator Moynihan has sent a letter in support of Judge Altimari, and I would ask that it be placed in the record.

Judge **Altimari**. Thank you, Mr. Chairman.

[The letter referred to follows:]

U.S. Senate,
Washington, D.C., December 6, 1982.

Hon. Strom Thurmond,
Chairman, Judiciary Committee,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Though necessarily absent from this hearing, I am most pleased to introduce Frank X. Altimari, a New Yorker, who has been nominated to be United States District Judge for the Eastern District of New York.

I am confident the Committee will tender Judge Altimari every proper consideration. He is recommended without reservation.

Sincerely,

Daniel Patrick Moynihan.

The **Chairman**. Senator Mathias, would you come around with your appointee?

Senator Mathias is here in behalf of Joseph Colaianni, of Maryland, to be a judge of the U.S. Claims Court.

STATEMENT OF HON. CHARLES McC. MATHIAS, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator **Mathias**. Mr. Chairman, it is my great pleasure to present to the committee Joseph V. Colaianni, who is the nominee of the President of the United States for appointment to the U.S. Claims Court.

He is accompanied here today by Mrs. Colaianni, and by three fine sons, Vincent, Joseph, and Mike. They are all here, supporting him, and I think maybe their testimony is more important than mine, because family support, as the chairman well knows, is extremely important in public life.

Mr. Colaianni is a resident of the State of Maryland. He lives in Rockville. He has been involved in a number of civic and professional endeavors throughout his career. He served for 12 years as a trial judge in the Court of Claims, which was the predecessor to the Claims Court. In this position, he managed a docket of approximately 80 cases on a continuous basis, 80 matters constantly before him. These cases have run the gamut of issues in the court's jurisdiction.

Because of Mr. Colaianni's background and interests, he had the primary responsibility in the important area of patent infringement suits brought against the U.S. Government. In the cases assigned to him, he handled all aspects of pretrial, trial, and final adjudication.

Prior to his service as a trial judge at the Court of Claims, Mr. Colaianni was a trial attorney in the Civil Division of the Department of Justice.

I think he is particularly well-suited for the Claims Court because of his prelaw training in electrical engineering and his experience in the private sector, both as an engineer and in the preparation and examination of patent applications.

I am sure that on the Claims Court, Mr. Colaianni's service will continue to bear the hallmark of excellence that his prior service has always borne.

It is with great pleasure that I present him to the committee and urge the favorable action of the committee and of the Senate on his nomination.

The **CHAIRMAN**. Thank you very much, Senator, and I want to say to Judge Colaianni that you are highly recommended here. Senator Mathias is the chairman of one of the most important committees in the Senate, the Rules Committee, which controls all the office space and all the rules about everything around here; he is just about the boss of this place. And he is also ranking member of this committee. So you are in good stead with Senator Mathias behind you.

Judge **COLAIANNI**. Thank you, Senator.

The **CHAIRMAN**. We will excuse him now. I know he is busy.

Senator **MATHIAS**. Thank you, Mr. Chairman.

The **CHAIRMAN**. Are there any more Senators here in behalf of any of these appointees?

[No response.]

The **CHAIRMAN**. Are there any House Members here in behalf of these appointees?

[No response.]

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

I am very pleased to introduce to the Committee Joseph V. Colaianni, the President's choice for appointment to the United States State Claims Court. Mr. Colaianni lives in Rockville, Maryland with his family, and has been involved in a number of civic and professional organizations. Mr. Colaianni is very well-qualified for the position on the Claims Court, as he has demonstrated by his many academic and professional achievements.

Mr. Colaianni served for twelve years as a trial judge in the U.S. Court of Claims, the predecessor to the Claims Court. In this position, he managed a docket of approximately 80 cases on a continuous basis. These cases have run the gamut of issues in the court's jurisdiction. Because of Mr. Colaianni's background and interests, he had the primary responsibility in the important area of patent infringement suits brought against the U.S. Government. In the cases assigned to him, he handled all aspects of pre-trial, trial and final adjudication.

Prior to his service as a trial judge at the Court of Claims, Mr. Colaianni was a trial attorney in the Civil Division of the U.S. Department of Justice.

Mr. Colaianni is particularly well-suited for the Claims Court because of his prelaw training in electrical engineering, and his experience in the private sector, both as an engineer and in the preparation and examination of patent applications.

Mr. Chairman, I am sure that Mr. Colaianni's service on the Claims Court will continue to be outstanding. It is with great pleasure that I support the President's appointment of Mr. Coclaianni, and I urge his confirmation.

The CHAIRMAN. We will go back now. I believe we first heard from Mr. Bullock. Mr. Bullock, if you will come around. I have sworn you, so if you would please have a seat now.

Do you have any statement you want to make to the committee before I propound some questions?

TESTIMONY OF FRANK W. BULLOCK, JR., NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF NORTH CAROLINA

Mr. BULLOCK. No, sir. I just appreciate the opportunity to be here, Senator.

The CHAIRMAN. Do you have any members of your family here that you would like to be introduced?

Mr. BULLOCK. No, sir, I do not.

The CHAIRMAN. Do you have any special friends here that you want to introduce?

Mr. BULLOCK. I am here alone, Your Honor.

The CHAIRMAN. You are by yourself?

Mr. BULLOCK. Well, except for Senator East and Senator Helms; that is hardly by yourself.

The CHAIRMAN. Well, as long as they are with you, you are not by yourself. They are both able people.

I have a few questions here. Mr. Bullock, do you feel there is ever a need for judges to assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Mr. BULLOCK. If the question is to consider the control of complex cases to effectively manage them, perhaps, if you are talking about getting it to trial, Senator—I do not know whether I fully understand the question. If the question is should they continue to control the cases on a continuing oversight business, no, I do not think that that is called for except on the most rare occasions, perhaps, and I do not know what they would be, offhand.

The CHAIRMAN. In the trial itself.

Mr. SHORT. In other words, once you reach the trial stage, and you are in trial, is it necessary at that time?

Mr. BULLOCK. I am not sure I understand the question, Senator. To control the trial of the case itself, I think the function of the court is to try the issue before it, of course, and if the question is for the judge to be an administrator, no, sir, I do not.

The CHAIRMAN. By the way, do you think the judge should preside over the trial and direct the trial, and the jury, of course, would perform its function, but you would do all you could, I would imagine, to prevent delays and see that the trial goes right.

Mr. BULLOCK. Absolutely, to expedite the hearing, yes, sir.

BAIL FOR DRUG OFFENDERS

The CHAIRMAN. Mr. Bullock, it seems that many drug dealers when arrested are able to pay bond money easily and in some cases, leave the country, to resume their activities elsewhere. What changes, if any, in bail reform, do you feel should be implemented in order to deter this type of activity?

For instance, under the law now, a Federal judge cannot refuse bail; he can only fix the amount of bail that he feels will insure the presence of the defendant at trial. And a lot of us feel that this is dangerous, because a man can fix bond, and if it is a drug case, they make so much money, $1 million, sometimes, or more, in one drug haul, and they just post the bond and walk off, and then carry on their drug traffic elsewhere. I just wondered how you feel about that.

Mr. BULLOCK. Well, that certainly is a problem, Your Honor. Of course, I would not presume to tell the Congress what changes they should make in the bail law; I think that is up to you. But, of course, the bond——

The CHAIRMAN. Don't you think the law should be changed to give the judge an opportunity, if he deems it is in the interest of the public, to refuse bail? For instance, a man may have killed several people, and he is on trial for killing another person, and it might be dangerous for him to walk the streets again.

Mr. BULLOCK. Yes, sir, I think that is a realistic purpose. The bond money in the drug cases, of course, is just the cost of doing business with the drug dealers, like anything else, and if it is not set high enough, they are just going to use that as a typical business expense and leave the country or whatever. So in the absence of a change that would give the court the authority to confine the individual without bond at all, certainly, the district judge can set that bond high enough so that it would deter him, and perhaps prevent him, from skipping the country.

The CHAIRMAN. What are the standards that you use in deciding that your court has a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. BULLOCK. Senator, I cannot foresee a situation in which the court would or should have a continuing administrative responsibility. It may be those rare cases, but as I have said before, I think the court's duty is to decide the case or controversy before it and not assume the role of an administrator.

The CHAIRMAN. Mr. Bullock, the phrase, "judicial activism," is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does this phrase, "judicial activism," mean to you?

Mr. BULLOCK. Senator, we had a great Senator from our State, Sam J. Ervin, Jr., who was also an associate justice of our North Carolina Supreme Court, and he often defined judicial activists as those who would interpret the Constitution as if they had written it, instead of the Founding Fathers.

I agree wholeheartedly with Senator Ervin's definition of a judicial activist, in that he meant a judge who attempted to assume the role of the Congress or the role of the executive department, instead of interpreting the law and applying the law to the facts before the court. I certainly disapprove of judicial activism under that definition.

The CHAIRMAN. A great many of us feel that judges who are guilty of judicial activism go entirely too far and attempt to put their own ideas into play in a judicial decision, when it should be left to the Congress.

Mr. BULLOCK. Absolutely.

The CHAIRMAN. I agree wholeheartedly. The judges have not been elected by anyone. The Congress should make the law, and the judge should apply the law to the facts.

I think that covers your testimony. We wish you find service on the Bench, and good luck to you.

Mr. BULLOCK. Thank you, sir.

The CHAIRMAN. Now, I notice that Senator Percy, the able Senator from Illinois, has come in. If Senator Percy will come around, I believe you have a district judge here, Mr. Paul Plunkett, who has been nominated to be a district judge for the Northern District of Illinois. If you would like to speak in his behalf, we would be glad to hear from you.

STATEMENT OF HON. CHARLES H. PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator PERCY. I thank my distinguished colleague and the chairman very much indeed for this great privilege and the opportunity to present a very, very able lawyer from Chicago for this hearing and further, I trust, his confirmation to be U.S. district court judge from the Northern District of Illinois.

I recommended Paul Plunkett to the President for this important post after a very thorough search in which the leading bar associations in the Northern Judicial District participated.

Mr. Plunkett, along with a number of other candidates for this position, was thoroughly considered and then interviewed by four of Illinois' major bar associations. All of the associations gave Mr. Plunkett their unqualified recommendation.

Paul Plunkett is a partner in a highly respected firm, Mayer, Brown & Platt of Chicago. In addition to this experience, he will bring to the bench a broad and varied legal background. He was educated at Harvard college, where he graduated cum laude, and subsequently received his degree from Harvard Law School in 1960.

He has served as assistant professor at the John Marshall Law School and as an instructor at Loyola University Law School and is currently adjunct professor of law at Northwestern Law School, where he plans to continue to teach.

Prior to entering private practice, Mr. Plunkett was with the Criminal Division as an assistant U.S. attorney for the Northern District of Illinois. He also worked pro bono as a member of the Federal defender panel for over 10 years.

In brief, Mr. Chairman, I believe Paul Plunkett brings to the court the background, experience, temperament and character that we seek in those nominated to the Federal Bench.

I had a long discussion with him about his responsibilities if he was nominated by the President, and confirmed by the Senate and I was completely satisfied with the result of that long conversation. I believe he will carry out the offices of district court judge with the highest integrity and in the outstanding manner that we would expect of him.

I recommend him to the committee, Mr. Chairman, without any reservation whatsoever and with great enthusiasm.

The **Chairman**. Fine. Mr. Plunkett, you are very fortunate to have such an able Senator here, endorsing you so highly. Senator Percy is chairman of the Foreign Relations Committee, and he is held in high esteem by his colleagues here in the Senate, and I congratulate you that he has come here in person to endorse you in this manner.

Senator Percy, I know you are busy, and if you wish to be excused, please, feel free to leave.

Senator **Percy**. I would like to return to the floor; I am managing a bill down there, Mr. Chairman, and I thank you very much, indeed.

The **Chairman**. We have a letter from Senator Dixon, also, supporting Mr. Plunkett's nomination, and I would ask that that be placed in the record, and we will ask that Mr. Plunkett's biography be placed in the record.

[The prepared statement of Senator Dixon follows:]

Prepared Statement of Senator Alan J. Dixon

Mr. Chairman, this afternoon I am pleased to introduce to you and my colleagues on the committee, Mr. Paul Plunkett of Glenview, Illinois, who is the nominee for U.S. District Judge for the Northern District of Illinois.

Mr. Plunkett brings with him a wealth of experience, not only in legal practice, but in legal instruction as well.

He has taught as an assistant professor at the John Marshall Law School and served as Director of the Loyola Law School Advocacy Program. Most recently he has taught Evidence and Trail Practice at Loyola University Law School.

His professional career includes serving as Assistant U.S. Attorney for the Northern District of Illinois from 1963–66.

Mr. Plunkett has practiced in numerous prestigious legal firms and is presently a partner in the firm of Mayer, Brown & Platt of Chicago, where he is in charge of all major Federal cases on behalf of Continental Illinois National Bank & Trust Company, International Paper Company and other major clients.

I am happy to present Mr. Plunkett to you today and I wholeheartedly endorse his confirmation to the Federal Bench.

The **Chairman**. Next, we have Judge Altimari, if you will come back around, and be sworn.

Do you solemnly swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Judge **Altimari**. I do.

The **Chairman**. Have a seat, Judge.

Do you have any family here that you would like to introduce, or any special friends?

Judge **Altimari**. I do. First, a dear friend of the family, Robin Rollinson; I believe she is on Senator Symms' staff; and my son, Nicholas, who was with Senator Baker at one time, and now, almost a lawyer.

The **Chairman**. We are glad to have them here.

TESTIMONY OF HON. FRANK X. ALTIMARI, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

The **Chairman**. Judge, you have served on the Nassau County Supreme Court, I believe, since 1974, and prior to that, you were a judge on both the district court and the county court for the

County of Nassau. I am confident that you are very knowledgeable of State laws in New York.

Do you foresee any difficulty in the transition from the State court system to the Federal district court?

Judge ALTIMARI. Well, Senator, many of the cases on the Federal docket are diversity cases. I have served extensively, as indicated, in the major criminal indictments in the county, and as to the others which I have not been exposed to, I will address myself with industry, and hopefully, with some degree of scholarship.

The CHAIRMAN. Judge, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge, as opposed to an elected legislative body?

Judge ALTIMARI. Senator, as we all know, we have three distinct, separate branches of government, and I firmly believe that we should not intrude on the other two areas of government. A judge's primary obligation is to determine grievances and to address himself to the issues at hand. The adversary proceeding has served us so well in this country for so many years.

The CHAIRMAN. A great many judges feel that if there is a vacuum in the law that they can just substitute that decision and fill in the law. How do you feel about that?

Judge ALTIMARI. Oh, I disagree with that. I think that again, you must address yourself to the issues. And the due process that we all love and hold so dearly requires that the parties be heard in open and full court and that the issues be addressed by the parties aggrieved. You should always address yourself to the grievances presented to you and not overflow into other areas.

The CHAIRMAN. Judge Altimari, I recently introduced the Violent Crime and Drug Enforcement Improvement Act of 1982. This bill, among other things, calls for sentencing reform. The major features of this provision include setting forth the purpose of sentencing and changing the sentencing system to a determinate sentence, with no parole and limited good time credit. A seven-member sentencing commission would be responsible, subject to review by Congress, for promulgating sentencing guidelines for the courts to use in determining an appropriate sentence. The Court would be required to explain the basis for any sentence outside the guidelines.

Would you give me your thoughts on the need for sentencing reform and comment on the provisions that I have just outlined?

Judge ALTIMARI. Well, as one who has served in the criminal courts for some many years, I firmly believe in a swift and certain justice. It is only with swift and certain justice that we can attain any sense of civility. As one who has sentenced hundreds of defendants, I am convinced that a judge would welcome a guideline with regard to sentencing. It would present another tool for him to properly approach a very, very difficult situation, which is always the liberty of another.

The CHAIRMAN. Judge, from your experience as a State judge, and with your background and experience, do you believe it would be helpful to you as a Federal district court judge to have a sentencing commission establish uniformity in sentencing?

There are some crimes where, for instance, a judge can go from 2 years to 30 years in crimes, and defendants feel, when one defendant gets a light sentence and one a very heavy sentence, that there is discrimination, more or less, and by having a judge limited to certain sentences he can give, not too light and not too heavy, and if he goes either way, he would have to explain that. Do you think that would be a reasonable provision?

Judge ALTIMARI. Well, we have always had disparity of sentence and almost scandalous disparity, on occasion. I think anything that helps in the direction of cutting down the disparity would be welcome.

The CHAIRMAN. Thank you very much. We hope you enjoy serving on the Bench and we wish you good luck.

Judge ALTIMARI. Thank you, Senator.

The CHAIRMAN. All right, Mr. Plunkett, if you will come around, please, and be sworn. Do you solemnly swear that the evidence you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. PLUNKETT. I do.

TESTIMONY OF PAUL E. PLUNKETT, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

The CHAIRMAN. Mr. Plunkett, do you have any of your family here, or any friends you want to introduce?

Mr. PLUNKETT. Senator, three of my sons are in college, and my youngest son is ill, and my wife is with him at home, so I did not bring any of my family, although I had planned to do so.

FINANCIAL ARRANGFMENTS

The CHAIRMAN. All right. Mr. Plunkett, would you please describe the arrangements you have made to dissolve your financial interest in your law firm; specifically, what time period is involved, and what arrangements have you made to be compensated for your work on pending litigation?

Mr. PLUNKETT. Senator, my law firm of Mayer, Brown & Platt, 2 years ago, was fortunate enough to have another person, the first woman placed on the Northern District of Illinois, Susan Getzendaner. I say that only because my firm is experienced in dealing with this problem.

All of the interest I have in my law firm will terminate as of the end of this year. All of the interest I have in my clients will terminate, and my clients will remain with that law firm. There will be no further remuneration from my firm of any kind.

HANDLING INCOMPETENT COUNSEL

The CHAIRMAN. Mr. Plunkett, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator, and was not prepared to adequately represent the interest of his or her client.

Mr. PLUNKETT. Senator, in our district, we have taken the lead in attempting to have quidelines in the U.S. district court. Our court is in the process of preparing an admissions plan whereby lawyers must demonstrate to the lawyers on the committee and the judges themselves that they are qualified to appear in the Federal district court before they are allowed to do so. Thus, I am hopeful that such a problem will not occur in the Northern District of Illinois.

However, I have to add, Mr. Chairman, that the guidelines involve three trials, and as a young prosecutor, after three trials, I did not feel particularly competent to represent my client, the United States. So I think it is still possible that such may occur.

If it were to occur, I think the answer to your question would depend upon whether it is a criminal or a civil trial, at least in part. In a criminal trial, we have to be concerned about the Supreme Court rules for effective assistance of counsel, and if it became apparent to me that the defendant was not receiving effective assistance of counsel, I think in that situation I would have to talk with him with the prosecutor present and urge him to add another attorney to help him in the defense. I don't think the problem is a serious one in civil litigation, because the parties have there chosen their own lawyers' and I think they sink or swim with them.

The CHAIRMAN. Mr. Plunkett, in 1980, prisoner petitions comprised approximately 14 percent of all U.S. district court litigation filings, in all district civil ligitation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements calling for complete exhaustion of State remedies; time limitations on the filing of petitions, and eliminating magistrates' authority to hold evidentiary hearings.

Mr. Plunkett, you have worked both as a Federal prosecutor, I believe, and as a member of the Federal defender program.

Mr. PLUNKETT. Yes, Senator.

The CHAIRMAN. With this background, do you feel there is a need to alter the degree of access to Federal courts by State prisoners, and if so, what recommendations in this area would you make? It appears now that litigation can go on for years.

Mr. PLUNKETT. It can. I agree that it is a serious problem. I agree that some limitations have to be placed on these constant petitions into the Federal court. The only suggestion I had, after thinking about it for some time, was to suggest to the Senator that perhaps there would be a way in which these petitions are sent to our Federal defender program, much the way the FBI or any other investigative agency brings complaints to the prosecutors. If they were screened by the Federal defender, and only those that were deemed proper were presented to a magistrate, much in the way of a probable cause hearing that a prosecutor uses for an indictment, and only after those two steps did they come to the U.S. district court, I think the Federal system might be able to get a better control of them. But they are clogging an already clogged system, and I think it would be very helpful to the court system for Congress to seriously consider doing something about it.

I am advised by the Chief Judge that if the Senate confirms me, that when I go to my new job, I will be given 350 cases the day I arrive. So I think it is a serious problem.

The CHAIRMAN. We have introduced a bill to limit the time when people who are serving sentences now in State courts can appeal to a Federal court. In other words, you get a trial in a State court, you go all the way through the State system, including the top appellate court, and then after several years, maybe 5 or 10 years, he will come in and claim he did not get a fair trial or that a witness did not appear, or something. And it is amazing how much time is taken with these Federal judges to hear those matters. So we feel there should be a limit—1 year or sometime—in which they can appeal, and go ahead and get through with it. You cannot carry on litigation forever.

Mr. PLUNKETT. I agree. The Congress has imposed on litigants, particularly the U.S. Government, a statute of limitations on crime beyond which we cannot prosecute. I do not see the unfairness at all of imposing the same limitation on defendants seeking redress in the courts. I think it is appropriate and proper.

CONFLICT BETWEEN CONSCIENCE AND STATUTE

The CHAIRMAN. Mr. Plunkett, how would you resolve a conflict between your own conscience or your own sense of justice, and the clear meaning of a statutory constitutional provision?

Mr. PLUNKETT. Senator, as a trial lawyer, I have picked jurors for 20 years. I have asked all of them if they can put prejudice, bias out of their minds. I think we can hardly ask less of our judges. I would decide the question on the basis of what the statute said, because that is what the obligation of a judge is.

The CHAIRMAN. We hear a lot today about judicial activism and about judges stepping in and practically writing the law, in many cases. How do you feel about the judges giving their own interpretation of what ought to be the law?

Mr. PLUNKETT. I am against it, and the reason I am against it is, as people before me have said, I do not understand that I have a mandate from the people of Illinois or from anywhere else to pass laws. I understand my job to be to construe the laws that Congress is passing, to apply them to facts before me. I do not believe we have any business as legislators. That is not the way we were set up, and that is not the way in which I would conduct my court, if confirmed.

The CHAIRMAN. Do you have any other statement you would like to make, sir, for the record?

Mr. PLUNKETT. No, sir, except to thank you for allowing me to appear here today, to tell you that I enjoyed it, and to thank Senator Percy for sponsoring me.

The CHAIRMAN. Well, we are glad to have you with us. We wish you happiness and success on the bench and hope you enjoy your new work.

Mr. PLUNKETT. Thank you, Senator.

The CHAIRMAN. You are now excused.

Our next judge is Judge Colaianni, of Maryland, to be a judge of the U.S. Claims Court.

Judge, I might just swear all of you at once. We have you, and Judge Yock, of Virginia, and Mrs. Christine Nettesheim, of the District of Columbia, and if all three of you would stand, you may be sworn at one time.

Do you solemnly swear that the testimony you give in this hearing, each of you, shall be the truth, the whole truth, and nothing but the truth, so help you God.

Judge Colaianni. I do.

Judge Yock. I do.

Mrs. Nettesheim. I do.

The Chairman. We will take Judge Colaianni first.

TESTIMONY OF HON. JOSEPH V. COLAIANNI, NOMINEE, JUDGE, U.S. CLAIMS COURT

The Chairman. Judge Colaianni, what are the major changes resulting from the creation of the U.S. Claims Court, as opposed to the old Court of Claims?

Judge Colaianni. Well, I think the major change is that we are now able—that is, the new Claims Court judges—are able to hand down final decisions, and that has various ramifications. Under the old system, the trial judge made a recommendation which had to be adopted by the full court. As a result, since you were not sure just what issues would be as important to the full court as were to the trial judge, you wrote extensive findings of fact, you made extensive conclusions of law; the opinion was very, very prolix. I think with the ability to enter final decisions, of course, that will all come to an end. I think you can handle the decisions more in the fashion of the district court judges and the decisions should be shorter and more to the point. That is the major change that I foresee.

The Chairman. Without objection, I will ask the reporter to place your résumé in the record.

Judge Colaianni. Thank you.

The Chairman. Judge, you served both as a Commissioner on the U.S. Court of Claims and as a Judge of the Claims Court. What, in your opinion, are the most advantageous aspects of the new court over the previous system?

Judge Colaianni. Well, again, one of the most telling differences is the fact that we can now enter a final judgment.

The Chairman. Speak a little louder; we cannot hear you.

Judge Colaianni. I am sorry. One of the most important things is that we can enter a final judgment, and I think that that will go a long way to help dispose of cases in a more expeditious fashion. Other changes, of course, are that we will now be able to entertain TRO's and to do work which was not before the old Court of Claims.

Basically, the job does not change that drastically; it is just a difference in attitude, a difference in perspective, and a difference in handling the job.

The Chairman. Judge, what rules of procedure and evidence will govern proceedings in the U.S. Claims Court?

Judge Colaianni. Well, of course, we are bound by the Federal Rules of Civil Procedure, and we are also bound by the Federal Rules of Evidence. In addition to the Federal Rules of Civil Procedure, we do have the right, and have promulgated our own rules, but they are patterned primarily after the Federal Rules of Civil Procedure.

The Chairman. I believe you referred to the term, "TRO." You might just tell us for the record what that means.

Judge COLAIANNI. I am sorry, that is "temporary restraining order."

The CHAIRMAN. Judge, do you foresee any particular benefits or problems arising out of the nationwide jurisdiction of the U.S. Claims Court?

Judge COLAIANNI. Well, the benefits are many. We, of course, with nationwide jurisdiction can take our court, so to speak, to all points of the compass of this great country of ours, and we can hear witnesses across the full breadth of this country. That is of some assistance to parties who cannot afford to bring their witnesses to Washington for a hearing. It does, on the other hand, present some problem to the family, since the Judge has to travel, but it is a minor problem.

The CHAIRMAN. Do you have any family here that you would like to introduce or any special friends?

Judge COLAIANNI. Yes, Senator, and I thank you for the opportunity. I guess I should say that no person can take full credit for all of the accomplishments which he has made in life, especially if he is a married person, and I take no full credit for my small accomplishments. I share them with my wife, who has proven to be a dedicated mother, who has put her own career on the back burner while the kids are growing up, and who has been very supportive of me. And I take this time to introduce to you my wife, Rita Colaianni.

The CHAIRMAN. We are glad to have her with us. Do you have any children here?

Judge COLAIANNI. I do indeed, Senator. I have our oldest son, Joseph, our middle son, Michael, and our youngest son, Vincent. We have another daughter who felt that the pressures and priorities of high school did not permit her to be here today.

I also have one other guest I would like to introduce, and that is Trial Judge Murray Bernhardt, who served on the Claims Court for many, many, many years, and perhaps needs no introduction.

The CHAIRMAN. We are glad to have him with us, and glad to have all these people with us.

Judge COLAIANNI. Thank you.

The CHAIRMAN. Well, we wish you happiness and success in your future work, and you are now excused.

Judge COLAIANNI. Thank you for the opportunity to appear here. It was a pleasure.

The CHAIRMAN. Our next nominee is Judge Robert J. Yock, of Virginia. Without objection, we will place his résumé in the record.

Do you have any statement you would like to make, Judge Yock?

TESTIMONY OF ROBERT J. YOCK, NOMINEE, JUDGE, U.S. CLAIMS COURT

Judge YOCK. I do not believe so, Senator. I am just very pleased to be here.

The CHAIRMAN. Do you have members of your family here and would you like to introduce those now?

Judge YOCK. Yes, I do. I have my wife, Carla, and my two children, Signe and Torunn.

The CHAIRMAN. We are glad to have them with us.

Judge, you have served on the Claims Court, previously known as the Court of Claims, since 1977, I believe.

Judge YOCK. That is correct.

The CHAIRMAN. With this experience, do you feel that any particular areas of interest to the court were overlooked by the Congress in creating the new U.S. Claims Court?

Judge YOCK. There are several points that maybe Congress would want to consider in any bill that would fill in some pieces. One, for instance, is the contempt power, which the Claims Court does not have now, and I think it is important——

The CHAIRMAN. Could you please speak a little louder?

Judge YOCK. Yes. I think the contempt power, for instance, is one aspect of the Claims Court that is not present currently, and I think that——

The CHAIRMAN. You do not have that power now?

Judge YOCK. We do not have the contempt power now, and I think we should.

The CHAIRMAN. You think you should have that power?

Judge YOCK. Yes, I think we should—not that we would have great occasion to use it, but I think it should be there when necessary.

The CHAIRMAN. And what else did you say?

Judge YOCK. There are several, very small points, but I do not think anything major comes readily to mind.

The CHAIRMAN. I wonder if you and the other members of the Court of Claims would think about this and drop me a letter and give me any other suggestions you think would improve the work of the courts.

Judge YOCK. We certainly will, sir, we certainly will. Thank you very much for the opportunity.

The CHAIRMAN. Judge, what positive factors do you see in the Federal Courts Improvement Act, as it specifically relates to the new U.S. Claims Court?

Judge YOCK. I am sorry, sir, what were the positive aspects—I did not understand your question.

The CHAIRMAN. What positive factors do you see in the Federal Courts Improvement Act, as we passed it, as it specifically relates to the new U.S. Claims Court?

Judge YOCK. I think the most important thing, and Judge Colaianni has already mentioned this to you, but I think the most important thing is the entry, the right for the Claims Court judges to enter final judgments. I think it saves a lot of judicial time. It saves the trial judges, who are now the judges of the Claims Court, from overwriting. I think we just decide now what are the major issues of the case and speak to them and issue our judgment, and then it goes up on appeal, if the parties choose to take it on appeal. But it is not automatic, and in any event, I think it is very much of a benefit.

The CHAIRMAN. Judge in the Trial Division of the present U.S. Court of Claims, some judges have become experts on certain types of cases such as patents, and they have been assigned to these cases to the exclusion of the other judges.

What do you feel should be the practice of the Claims Court with regard to this type of specialization?

Judge Yock. Well, I do not believe that the judges of the Claims Court should specialize. We all come from a background where we may well have specialized in our private practice or in our government work before coming on the court. But I think once we get to the court, I think we are assumed to be able to handle any type of a case that is before the court, and I think it would be wrong if we would try to pigeonhole ourselves into one particular type of case.

Now, at the same time, I do not think that we should necessarily exclude or not utilize the special qualities that any one particular judge may have. For instance, if we have a particularly tough patent case, it seems to me that in the interest of judicial economy, we might want to allow the chief judge the authority to assign that case to a judge who may have the greatest background and experience in that area.

But as a general rule, I do not think we should be specialized.

The Chairman. Judge, the Federal Courts Improvement Act authorizes the Court of Appeals for the Federal Circuit to employ technical assistants whose functions are intended to mirror those of law clerks.

Do you think a comparable provision should have been included to apply to the claims court?

Judge Yock. No, I do not necessarily think it is essential that we have that authority. At least, give us a little bit more time on that. If it turns out that we feel, and if the judges feel, in time, that we need this authority, then I think maybe we should come back to Congress and explain to you why we need that authority, but right now, I do not really think we need the authority.

The Chairman. Well, I hope you enjoy your service on the court.

Judge Yock. Thank you very much, Senator.

The Chairman. And, of course, you can stay in touch with us with any suggestions you have, and we wish to cooperate in any way we can. So we wish you good luck.

Judge Yock. Thank you very much, Senator. I appreciate it.

The Chairman. Next, Judge Nettesheim. Is that the way you pronounce it?

Mrs. Nettesheim. It is "Nettesheim." I am Mrs. Nettesheim. I am not a judge, yet.

The Chairman. Well, you are about to be, aren't you?

Mrs. Nettesheim. I hope so.

The Chairman. Well, Mrs. Nettesheim, we are glad to have you with us.

Mrs. Nettesheim. Thank you so much, Mr. Chairman.

TESTIMONY OF CHRISTINE COOK NETTESHEIM, NOMINEE, JUDGE, U.S. CLAIMS COURT

The Chairman. Are there any ladies on that Court of Claims now?

Mrs. Nettesheim. I believe Judith Yannello was grandfathered over. I served with her in the Justice Department.

The Chairman. So there will be two of you there, then, when you get confirmed.

Mrs. Nettesheim. Yes.

The **Chairman.** Do you have any family members here you would like to introduce?

Mrs. **Nettesheim.** Thank you. Unfortunately, my husband is hospitalized, but I am very lucky to have with me today my sister, from New Zealand, Marsha Woodbury, and her husband, Roger, and their young son, Luke, who I think was taken from the room in shame after the first hour. I am also very fortunate to have Elsie Carper, from the Washington Post, and Theresa McMasters, from the Hollywood Reporter, and Elsa and Maurice Pairel, from Chez Odette Restaurant. I believe you know Mr. Pairel as your son's soccer coach.

The **Chairman.** Well, we are glad to have these people here.

Mrs. Nettesheim, how has your experience and background prepared you for the position of a U.S. Claims Court judge?

Mrs. **Nettesheim.** Mr. Chairman, for the last 12 years, I have been litigating continuously in civil litigation, most of which have been complex cases. Before that, I was privileged to serve with a former chief judge of the United States Court of Appeals for the Tenth Circuit as a clerk, and I believe the combined background of litigation experience and the clerkship will serve me well as a judge.

The **Chairman.** What standards of conduct and ethics will guide you during your tenure as a claims court judge?

Mrs. **Nettesheim.** I hope to be able to abide by the highest standards of ethics and conduct, and employ them always in the matters before me.

The **Chairman.** Do you foresee any particular benefits or problems arising out of the nationwide jurisdiction of the United States claims court?

Mrs. **Nettesheim.** Mr. Chairman, I am reluctant to echo the remarks of those before me, but I believe they adequately summarize both the benefits and the detriments. I believe the large benefits are to the parties claimant, affording them the economies of litigation, of having the court have the capacity to travel. The only detriment would be the inconvenience to the family members of the individual judges.

The **Chairman.** The jurisdiction of the new claims court includes limiting authority to issue preaward injunctions in Government contract cases. Do you believe that sufficient standards exist to guide the claims court judges in the exercise of this authority?

Mrs. **Nettesheim.** The claims court is particularly fortunate to be in the District of Columbia where, at least in my opinion, the best standards for issuance of injunctive relief have been developed by our district and Federal appellate court.

As an initial matter, I believe the claims court should look to those well-developed standards, of course realizing that the judges will have a responsibility to refine those standards as their familiarity with this new authority develops.

The **Chairman.** Is there anybody else you would like to introduce?

Mrs. **Nettesheim.** I think my nephew has arrived. No; thank you.

The **Chairman.** I think that completes it. We wish you happiness and success on the bench, and I hope this court will stay in close touch with us, as I have stated, and give us the benefit of any suggestions.

Mrs. NETTESHEIM. Thank you very much.

The CHAIRMAN. I notice Ms. Sheila Joy came in. Where is Ms. Joy now?

Ms. Joy, we just want to welcome you here, and thank you for the fine cooperation that you have given to us from the Department of Justice.

Ms. JOY. Thank you, Mr. Chairman.

The CHAIRMAN. That is all. Thank you very much.

I believe that completes our hearings today, so we will now stand adjourned.

[Whereupon, at 3:10 p.m., the committee was adjourned.]

BIOGRAPHIES

FRANK W. BULLOCK, JR.

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF NORTH CAROLINA

Birth: November 3, 1938, Oxford, N.C.

Legal residence: North Carolina.

Marital status: Divorced.

Education: 1957-58—Duke University; 1958-1963—University of North Carolina (1961, B.S. degree, 1963, LL.B. degree).

Bar: 1963—North Carolina.

Experience: 1963-65—Law clerk to Hon. Algernon Butler, U.S. District Court, Eastern District of North Carolina; 1964-68—Partner, Maupin, Taylor & Ellis, Raleigh, N.C.; 1968-73—Assistant Director & Administrative Assistant to Chief Justice, Administrative Office of the Courts, State of North Carolina; 1973 to present—Partner, Douglas, Ravenel, Hardy, Crihfield & Bullock, Greensboro, N.C.

FRANK X. ALTIMARI

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

Birth: September 4, 1928, Queens, N.Y.

Legal residence: Married to Angela Scavuzzo Altimari, 4 children.

Education: 1946-48—St. Francis College; 1948-51—Brooklyn Law School, LL.B. degree.

Bar: 1951—New York.

Experience: 1951-56—Associate, Austin & DuPont, Jamaica, N.Y.; 1956-66—Partner, Hoffmann & Altimari; 1966-70—Judge, district court, county of Nassau; 1970-73—Judge, county court, county of Nassau; 1974 to present—Justice of supreme court, county of Nassau.

PAUL E. PLUNKETT

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: July 9, 1935, Boston, Mass.

Legal residence: Illinois.

Marital status: Married to Martha Milan Plunkett, 4 children.

Education: 1953-57—Harvard College, B.A. degree; 1957-60—Harvard Law School, LL.B. degree.

Bar: 1960—Illinois.

Experience: 1960-61—McMahon & Plunkett, Chicago, Ill.; 1961-63—Mayer, Brown & Platt, Chicago; 1963-66—Assistant U.S. attorney, Northern District of Illinois; 1966-78—McMahon & Plunkett, Chicago; 1978 to present—Mayer, Brown & Platt, Chicago.

JOSEPH V. COLAIANNI

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: March 19, 1933, Detroit, Mich.

Legal residence: Maryland.

Marital status: Married to Rita Milena Roll, 4 children.

Education: 1951-56—University of Detroit, B.E. degree; 1956-58—Wayne State University; 1958-61—George Washington University National Law Center, J.D. degree.

Bar: 1962—Michigan, 1963—Ohio.

Experience: 1961-62—Attorney, Burroughs Corp., Detroit, Mich.; 1962-63—Associate, Marshall, Wilson & Yeasting, Toledo, Ohio; 1963-66—Associate, Fay & Fay, Cleveland, Ohio; 1966-70—Trial attorney, U.S. Department of Justice, Civil Division, Washington, D.C.; 1970-82—Trial judge, U.S. Court of Claims; October of 1982 to present—Judge U.S. Claims Court.

ROBERT J. YOCK

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: January 11, 1938, St. James, Minn.

Legal residence: Virginia.

Marital status: Married to Carla Moen Yock, 2 children.

Education: 1955-59—St. Olaf College, B.A. degree, cum laude; 1959-62—University of Michigan Law School, J.D. degree.

Bar: 1962—Minnesota, 1972—District of Columbia.

Military service: 1962-66—U.S. Navy, Judge Advocate General's Corps, honorable discharge.

Experience: 1966-69—Associate, Thomas, King, Swenson & Collatz, St. Paul, Minn.; 1969-70—Chief Counsel for the National Archives and Records Service, General Services Administration, Washington, D.C.; 1970-72—Executive Assistant and Legal Advisor to the Adminstrator, General Services Administration; 1972-77—Assistant General Counsel for Adminstration and Records, General Services Administration; 1975—Assistant Administrator (Acting), General Services Administration; 1977-82—Trial judge, U.S. Court of Claims; 1982 to present—Judge, U.S. Claims Court.

CHRISTINE COOK NETTESHEIM

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: August 26, 1944, Oakland, Calif.

Legal residence: District of Columbia.

Marital status: Married to Paul Henry Nettesheim.

Education: 1962-66—Stanford University, B.S. degree; 1966-69—University of Utah College of Law, J.D. degree.

Bar: 1969—Utah, 1972—District of Columbia, 1982—California.

Experience: 1969-70—Law clerk to Hon. David Lewis, U.S. Court of Appeals, 10th Circuit, Salt Lake City, Utah; 1970-72—Trial attorney, Civil Division, U.S. Department of Justice; 1972-74—Trial attorney, Bureau of Consumer Protection, Federal Trade Commission; 1974-76—Associate, Hogan & Hartson; 1976-78—Special counsel, Pension Benefit Guaranty Corp.; 1978-80—Assistant General Counsel, U.S. Railway Association; 1980 to present—Associate, Shack & Kimball, P.C.

CONFIRMATION HEARING ON:

SAM H. BELL AND JOHN W. BISSELL

WEDNESDAY, DECEMBER 8, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 8:42 a.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Vinton DeVane Lide, chief counsel and staff director; Duke Short, chief investigator; Bill Christensen and Allan Spence, investigators; and Pamela Swanner, clerk.

NOMINATION OF SAM H. BELL

The CHAIRMAN. The committee will come to order.

This morning we have a hearing for two Federal district judges. The first is Judge Sam H. Bell of Ohio, to be U.S. district judge for the Northern District of Ohio.

Is Judge Bell here?

Judge Bell, will you come around and have a seat? Stand up and be sworn.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BELL. I do.

TESTIMONY OF JUDGE SAM H. BELL, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

The CHAIRMAN. Do you have any members of your family here that you would like to introduce?

Judge BELL. My son, the assistant director of law for the city of Akron, is with me this morning.

The CHAIRMAN. We are glad to have you with us.

Without objection, the résumé of Judge Bell will be placed in the record.

Senator Glenn has sent in his blue slip approving you. Senator Metzenbaum has indicated that he has not had sufficient time to review the nomination of Judge Bell. His concern has been conveyed by Senator Metzenbaum's office.

I would also note that Senator Metzenbaum has not returned his blue slip indicating any objection nor has he made any other attempts to prevent today's hearing.

Judge **Bell**. Senator, may I advise you, sir, for the purpose of the record, that I have submitted my resignation to the Governor of the State of Ohio effective January 1. I think the Senate should know that.

The **Chairman**. You resigned as a State judge?

Judge **Bell**. Yes, sir. The letter will go out tomorrow. I released it last night.

The **Chairman**. I see.

Well, the record will so show.

Judge **Bell**. Thank you.

The **Chairman**. Judge Bell, you have served on the Ohio Court of Appeals for the Ninth Judicial District since 1977, I believe.

Judge **Bell**. Yes, sir.

The **Chairman**. This court, I understand, has jurisdiction over both the review of lower court decisions and original jurisdiction in certain statutory areas. Prior to that, you served as both a municipal court judge and as a judge on the court of common pleas. Is that correct?

Judge **Bell**. That is correct, sir.

The **Chairman**. With this experience, I am confident that you are very knowledgeable of State laws. I am just wondering if you foresee any difficulty in the transition from the State court to the Federal district court?

Judge **Bell**. Senator, I would anticipate that there is a great deal for me to learn. From the transitional standpoint, I do not expect any difficulties, sir.

The **Chairman**. Judge Bell, I consider judicial temperament to be a prerequisite for a Federal judge. Would you please give me your thoughts on this subject?

Judge **Bell**. Senator, it seems to me in the past 15 years that I have served on the bench, I have learned a great deal about judicial temperament and I think that my temperament is satisfactory in that regard, sir.

The **Chairman**. I think it is inexcusable for any judge, as I see some do, to raise his voice unduly or attempt to embarrass jurors, attorneys, court attachés, and I do think it is important for a judge to conduct himself in the manner that would be a credit to the bench and to himself, too.

Judge **Bell**. I agree with you completely, sir.

The **Chairman**. Judge, Federal law now provides for U.S. magistrates to try civil and criminal court misdemeanor cases with approval of the parties involved as well as approval of district court judges.

Do you feel that this is the best way to relieve the heavy caseload of the district courts and are these magistrates in your opinion the best qualified to act in the place of a Federal district judge?

Judge **Bell**. Senator, my opinion, based on what I have observed of our own district, this has been a very good answer to the caseload in our area, particularly northeastern Ohio. The magistrates that I know seem well qualified and seem to do a very fine job.

The **Chairman**. Judge, the committee is aware of the serious problems in some prisons, particularly from the standpoint of overcrowding and effective rehabilitation.

What recommendations, if any, can you offer regarding prison reform?

Judge BELL. Senator, I know there has been a number of studies carried on in the Federal field as well as in the local State fields in that regard. I think we are undergoing some area of transition in our prison system, both federally and State. I certainly would support a number of those penal reforms with the view in mind, sir, that whatever is done is done for the eventual protection of the public which seems to me to be the final criteria in these matters.

The CHAIRMAN. Judge, the question of judicial activism frequently comes into discussion. It appears that some judges have substituted their opinions and their desires for acts of Congress. We have three branches of Government. The Congress makes the laws and the judicial branch interprets laws. I just want to get your opinion about how you feel a judge exercises judicial activism in his court.

Judge BELL. I think the record that I have built, if any, on each of the benches on which I have served would indicate clearly that I am not much of an activist. I do not think that judges or courts should be legislators. They do not represent the people in the same manner as do you. I recognize and see it as an infringement on your function in relation to the actions of many of the courts, both Federal and State. I am not an activist judge, sir, and never have been.

The CHAIRMAN. Do you have any other statement you would like to make at this time?

Judge BELL. No, sir, except I thank you for your courtesy.

The CHAIRMAN. Well, we are very pleased to have you here and would hope that you have a successful tenure on the Federal district court in Ohio.

Judge BELL. You are most kind, sir. Thank you.

The CHAIRMAN. You are now excused.

NOMINATION OF JOHN W. BISSELL

Our next judge is Judge John W. Bissell. Will you come around, please?

Judge BISSELL. Good morning, sir.

I wonder if I just might. Senator Brady of New Jersey asked for the courtesy of introducing me this morning. I understand he is on his way literally. I am sure neither he nor I wish to delay these proceedings, but I wonder if we might accommodate him.

The CHAIRMAN. What we can do to save time, we have to open the Senate at 9:15, we will go ahead and let you testify and when he comes in, we will allow him to make his statement.

If you will hold up your hand and be sworn.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BISSELL. I do.

TESTIMONY OF JOHN W. BISSELL, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

The CHAIRMAN. I believe the blue slips of approval have come in from Senator Brady and Senator Bradley.

Judge **Bissell**. That is what I understand, sir. Thank you.

The **Chairman**. We are glad to have you with us.

Now, do you have any members of your family with you that you would like to introduce?

Judge **Bissell**. Yes, I have several, Senator. If I might introduce them to you.

My daughter, Megan Bissell, age 11, and in the sixth grade, is with us today. My sister, Nancy Bissell Goldcamp, a resident of Washington, is here today with her husband, Bill Goldcamp.

The **Chairman**. We are glad to have you with us.

Judge **Bissell**. Thank you.

The **Chairman**. Without objection, a résumé of your education and experience will be placed in the record.

Judge, I believe you have had extensive experience as a State court judge.

Judge **Bissell**. That is correct, since September 1978.

The **Chairman**. I understand you served on the Essex County District Court from 1978 until January of this year and from November 1981 to the present you have been a judge on the Superior Court of New Jersey.

Judge **Bissell**. That is correct.

The **Chairman**. Is the Superior Court the highest?

Judge **Bissell**. It is the court of general trial jurisdiction in the State of New Jersey.

The **Chairman**. Unlimited?

Judge **Bissell**. Unlimited State court jurisdiction, correct, both civil and criminal.

The **Chairman**. I would ask you also if you can foresee any difficulty in the transition from a State court to the Federal district court?

Judge **Bissell**. Sir, I see very little, if any. I certainly agree with Judge Bell that I will have some things to learn, particularly reacquaintance with such things as the Federal rules of evidence, but I did practice in the Federal court before going on the bench and, of course, State law is applied in Federal matters as well. So I do not anticipate any difficulties in the transition.

The **Chairman**. Judge, in response to a committee question concerning judicial activism, you stated, "In my view, most of the criticism of judicial activism is a result of lack of understanding of the proper role of the judiciary and the importance at common law of its orders and decisions as precedent."

Now, Judge, would you tell me where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking and what are the criteria you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elective legislative body?

Judge **Bissell**. I think the areas where the legislature has chosen to act and/or the areas where it should act are basically quite clear. The areas where a legislature, State or Federal, or a regulatory agency has passed regulations under statutory authorization, those are clearly areas of, if you will, legislative preemption and judges should not tread in those areas. There are, of course, a large number of other areas that have been left to the evolution of common law, the law of negligence, I think, is a classic example. In those circumstances, of course, the evolution and development of the law anticipates innovation on occasion, probably more from appellate courts than trial courts. But that is the area where I suppose judicial activism, if you will, is more appropriate. But certainly not where it is in the legislative sphere.

The **Chairman**. Under the Constitution, certain fields of jurisdiction were delegated to the Union in the Constitution and through amendment to the Constitution, other fields have been delegated to the Union, but other than those fields that have been specifically delegated to the Union, I would presume you would agree those jurisdictions are reserved to the States?

Judge **Bissell**. That is correct. That is the whole constitutional concept, Senator. I agree with that.

The **Chairman**. And in view of that, it would appear that the Federal Government in any of its branches should not enter fields that are reserved to the States?

Judge **Bissell**. I certainly agree with that and, moreover, I think as a good example, if a case were to come before me on the Federal court where I feel State jurisdiction was primary or State remedies had not been exhausted, I would undertake to have the matter properly remanded to the State system.

The **Chairman**. Judge, what do you consider as the proper application of stare decisis in the Constitution and law; specifically what is the duty of a Federal judge when confronted with a case in which one of the questions of his court clearly conflicts with the Constitution as that judge interprets it?

Judge **Bissell**. Well, if you have an action undertaken which, in the view of the judge presiding, is clearly unconstitutional, either from the letter of the Constitution itself or from clear precedent, applying the rule of stare decisis, then I would not hestiate to apply those constitutional principles and set any particular action aside. As a matter of fact, I would feel duty bound to do so if there were clear precedents, evolving particularly out of the U.S. Supreme Court on the point.

The **Chairman**. In other words, even if the court has handed down a decision on a certain matter, if you consciously feel that it conflicts with the Constitution, I presume you would abide by your own feeling about the Constitution and let the court review it again?

Judge **Bissell**. Well, I think that is a possibility as well. There are never two identical cases. Oftentimes what appears to be a clear precedent can only be construed consistent with its own facts, and there are occasions when different facts might require different results. I feel I certainly would have to consider Supreme Court precedent very carefully, but I would also exercise my own mind based upon the facts presented to me.

The **Chairman**. The dockets have been clogged in so many places. I do not know how it is in your State but in most States they are, and a great many people feel that if the judges would start a little earlier and run a little later, they would clear up those dockets.

I presume you feel it is important to clear up the dockets and you would be willing to work a little?

Judge **Bissell**. We have a pretty good system in New Jersey, Senator. We start our court 9 o'clock sharp in the morning and run right through until 4 p.m. I frankly do not know the hours for the U.S. District Court for New Jersey. But if I can get litigants in my courtroom at 9 a.m., that is when we are going to start.

The **Chairman**. Well, it sounds like you are willing to work and do a good job.

Judge **Bissell**. Thank you very much.

The **Chairman**. Do you feel there is a need for judges to assume direct control of complex issues in cases in order to avoid delays and effectively manage such cases?

Judge **Bissell**. Absolutely. And there have been some special cases in our State system that have been assigned to me while I have been a Superior Court judge for just that reason. There has to be control over those cases, both in terms of discovery and also narrowing of the issues, if you will, to make it a manageable package for trial. I certainly agree with that.

The **Chairman**. You were recommended, I believe, for appointment by Senator Brady.

Judqe **Bissell**. I had that privilege, yes, sir.

The **Chairman**. I might say that Senator Brady has been in this Senate only for a short period by appointment of the Governor, but he has made an indelible impression on his colleagues and has done an outstanding job here in the Senate as a U.S. Senator. We regret to see him leave and wish him well, and I believe he and Senator Bradley both have sent in blue slips endorsing you.

Senator Bradley was here a few moments ago. Did he wish to make any statement?

Judge **Bissell**. Senator Bradley indicated he was going to a Finance Committee meeting. However, he went out of his way to wish me well, and I certainly thank him for his kind remarks.

The **Chairman**. I see Senator Brady is now in the room with you and we would be very pleased to have the gentleman that recommended you to now speak in your behalf if he cares to do so.

Judge **Bissell**. Thank you, sir.

STATEMENT OF HON. NICHOLAS F. BRADY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **Brady**. Thank you, Mr. Chairman. You were very kind in your remarks.

I consider one of the very most important things, if not the most important thing, I have done since I have been in the Senate is presenting Judge Bissell's name for your consideration. He received absolutely outstanding marks from the legal community in our State, nothing but high praise for not only his understanding of the work but the speed with which he did it and the justice with which it was handled. He has been involved in the legal side of our State's affairs throughout most of his entire career, and it is with great pleasure that I put his name before you.

Senator Bradley asked me last night if he could be associated with these remarks. So he joins in this thought about Judge Bissell as well.

We thank you for considering him, and we think you have done a great thing for the State of New Jersey.

The CHAIRMAN. Thank you very much, Senator, and for your appearance and for your high recommendation of this gentleman. It certainly will assist him in the confirmation before the committee and the full Senate.

Judge Bissell, I wish you success and happiness on the bench and I am sure you will make an outstanding record and be a credit to Senator Brady and all who had a part in your recommendation and confirmation.

Judge BISSELL. Thank you very much, Senator. It was my pleasure.

The CHAIRMAN. I believe that is all we have here this morning so the committee now stands adjourned.

[Whereupon, at 9:02 a.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

SAM H. BELL

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Birth: December 31, 1925, Rochester, N.Y.

Legal residence: Ohio.

Marital status: Widower, 2 children.

Education: 1943-47—College of Wooster, B.A. degree; 1946-47—American University; 1948-52—Akron University School of Law, J.D. Degree.

Bar: 1952—Ohio.

Experience: 1950-55—Manager, Industrial Products Sales, Inc., Akron, Ohio; 1956-68—Private practice, Cuyahoga Falls, Ohio; 1955-56—Interim traffic prosecutor, Cuyahoga Falls, Ohio; 1957-59—Assistant county prosecutor, Summit County, Ohio; 1959-66—Special counsel for Attorney General, State of Ohio; 1963-65—Assistant solicitor and specialist counsel, city of Tallmadge, Ohio; 1968-73—Judge, municipal court, City of Cuyahoga Falls, Ohio; 1973-77—Judge, court of common pleas, Summit County, Ohio; 1977 to present—Judge, Ohio Court of Appeals, Ninth Judicial District.

JOHN W. BISSELL

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Birth: June 7, 1940, Exeter, N.H.

Legal residence: New Jersey.

Marital status: Married to Caroline Miller Bissell, 2 children.

Education: 1958-62—Princeton University, A.B. degree; 1962-65—University of Virginia Law School, LL.B. degree.

Bar: 1966—New Jersey.

Experience: 1965-66—Law clerk to Hon. Arthur Lane, U.S. district judge, Trenton, N.J.; 1966-69—Associate, Pitney, Hardin & Kipp, Newark, N.J.; 1969-71—Assistant U.S. attorney, District of New Jersey; 1972-1978—Partner, Pitney, Hardin & Kipp, Morristown, N.J.; September 1978—January 1982—Judge, Essex County District Court; November 1981 to present—Judge, Superior Court of New Jersey, Essex County.

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